(1) Supreme Court, U.S.
FILED
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No. _____

In the Supreme Court of the United States

THOMAS HENRICKSON,

Petitioner,

v.

JOHN E. POTTER, POSTMASTER GENERAL,

Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether there is compelling reason to grant this Petition for Writ of Certiorari because a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter. Supreme Court Rule 10(a).

Specifically, whether an employer's failure to accommodate an employee's disability constitutes a continuing violation. Specifically, the Fifth Circuit determined that Respondent's failure to accommodate Petitioner on a daily basis was not a continuing violation and Petitioner failed to contact his EEO counselor within the 45-day time limit. The Fourth, Sixth and Ninth Circuit Courts differ on this issue even when they apply a similar test to the one used by the Fifth Circuit. There is compelling reason to grant this Petition for Writ of Certiorari.

2. Whether there is compelling reason to grant this Petition for Writ of Certiorari because the United States Court of Appeals for the Fifth Circuit and the United States District Court, Southern Division of Texas has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court as to call for this Court's supervisory power. Supreme Court Rule 10(a).

Thomas Henrickson should still have a live cause of action in this case for retaliation under the Rehabilitation Act. The District Court did not grant summary judgment with respect to Henrickson's retaliation claim under the Rehabilitation Act until after Henrickson pointed out that the Court had not granted summary judgment on that claim. It was then that the Court entered a supplemental memorandum and recommendation granting Defendant's motion for summary

judgment regarding Plaintiff's retaliation claim under the Rehabilitation Act.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner is not required to file a corporate disclosure statement. Petitioner/Plaintiff is an individual. Respondent/Defendant John E. Potter, Postmaster General is a United States Governmental Entity.

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STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction to hear this case under the Americans with Disabilities Act (ADA) 42 U.S.C. § 12101; the Rehabilitation Act, 29 U.S.C. § 701; the Civil Rights Act of 1964 42 U.S.C. § 2000e; and the Civil Rights Act of 1964 42 U.S.C. § 1981. Jurisdiction is also proper and timely pursuant to 28 U.S.C. § 2101(c), Supreme Court Rules 10(a), 12.1, 13.1, 13.3, and 29.

OPINIONS BELOW

Petitioner is appealing a Denial of a Petition for Panel Rehearing entered June 24, 2003, by the United States Court of Appeals for the Fifth Circuit and a judgment of the United States Court of Appeals for the Fifth Circuit entered on April 23, 2003.

The United States District Court for the Southern District of Texas entered a final judgment July 3, 2002, a summary judgment order entered July 23, 2001, September 11, 2001 and May 22, 2002, and a supplemental summary judgment order entered June 18, 2002 that disposed of all of Petitioner's claims.

I. STATEMENT OF THE CASE

A. *Statutes Involved as the Basis for Federal Jurisdiction in the Court of the First Instance*

42 U.S.C. § 1981.

§ 1981 Equal Rights Under the Law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 2000e.

§ 2000e-2 Unlawful Employment Practices

(a) Employer Practices

"It shall be an unlawful employment practice for an employer- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin".

42 U.S.C. § 12102.

42 U.S.C. § 12101 et seq.

§ 12112 Discrimination

(a) General Rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to

job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

29 U.S.C. § 701. Rehabilitation Act

§ 701(c) Policy

It is the policy of the United States that all programs, projects, and activities receiving assistance under this chapter [29 U.S.C.A. § 701 et seq.] shall be carried out in a manner consistent with the principles of-

(1) respect for individual dignity, personal responsibility, self- determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities;

(2) respect for the privacy, rights, and equal access (including the use of accessible formats), of the individuals;

(3) inclusion, integration, and full participation of the individuals;

(4) support for the involvement of an individual's representative if an individual with a disability requests, desires, or needs such support; and

(5) support for individual and systemic advocacy and community involvement.

B. *Facts Material to the Consideration of the Questions Presented*

Summary Judgment was granted for the Defendant and Henrickson appealed to the Fifth Circuit. The case was ultimately dismissed by an order denying Henrickson's Petition for Panel Rehearing entered on June 24, 2003.

Thomas Henrickson is a male over the age of 40 who began working for Respondent on May 25, 1985 as a mail handler. Due to Henrickson's position as mail handler with Respondent, Henrickson suffers from a disabling condition consisting of left carpal tunnel syndrome, left ulna nerve entrapment and right carpal tunnel syndrome as well as a right rotator cuff tear. Henrickson's doctor prescribed a specific medically necessary ergonomic chair for Henrickson, which was only available from "Relax the Back" store, which had armrests that are needed to reduce the stress on the elbows, wrists, and shoulders. Pursuant to instructions from Respondent's agents, Henrickson obtained invoices from "Relax the Back" Store for the specifically prescribed ergonomic chair. Henrickson then submitted the invoices to Respondent just prior to being released with restrictions to light duty.

On May 22, 1998, Henrickson provided his supervisors Linda Schultz and Yvonne Edwards with the doctor's prescriptions for the medically necessary ergonomic chair. Henrickson told Ms. Schultz and Ms. Edwards that his doctor had prescribed a specific chair, as they were aware from the invoices. Henrickson also advised his supervisors that he would obtain clarifying information from his doctor.

Ms. Schultz did not acknowledge Plaintiffs doctor's prescription (and restrictions) and refused to accommodate

Plaintiff. Although Plaintiff had provided Ms. Schultz with invoices for the specifically prescribed chair and explained the significance of the specifically prescribed chair to Ms. Schultz, Ms. Schultz engaged in a "Goldilocks" type game and had Henrickson try out each chair in her office, in view of peers and colleagues. Henrickson had already been performing his job on limited duty in a similar chair and had knowledge and evidence that his doctor was requiring a specific ergonomic chair from "Relax the Back," different from the chairs normally used at the post office.

Henrickson requested the ergonomic chair on June 8, 1998, September 11, 1998, September 28, 1998, November 5, 1998, December 1, 1998, and on a continuing basis. In addition, Henrickson's doctor wrote accommodations for Respondent on November 5, 1998, September 17, 1999, and March 31, 2000. Henrickson reiterated once again that his doctor had prescribed a specific chair and refused to violate his restrictions by working in just any chair, similar to the one that the doctor was already aware that he had been working. That same day, May 22, 1998, Defendant designated Plaintiff as Absent Without Leave (AWOL) because he would not violate his doctor's orders. Defendant subsequently fired Plaintiff on July 19, 2000, because he would not violate his doctor's restriction and return to work.

Henrickson, filed suit in the United States District Court for the Southern District of Texas, Houston Division on May 12, 2000. Respondent moved for summary judgment on several grounds; i.e., that Henrickson failed to exhaust his administrative remedies with regard to his retaliation claim under the Rehabilitation Act, that Henrickson failed to establish a *prima facie* case of disability discrimination and retaliation, that Respondent did not regard Henrickson as disabled and that Respondent had legitimate

non-discriminatory reasons for dismissing Henrickson. Henrickson responded, contending that he did indeed exhaust all administrative remedies, that he established a *prima facie* case with regard to disability or perceived disability discrimination, that Respondent's "legitimate" reasons for terminating him were merely a pretext and arbitrary, that a causal nexus existed between Henrickson's protected activity and his dismissal and that there were genuine issues of material fact present to prevent summary judgment and present to a jury. Nonetheless, the District Court granted summary judgment in Respondent's favor as to Henrickson's claim of retaliation, request for punitive damages, and his claims under both the ADA and § 1981, but denied as to Henrickson's claims under the Rehabilitation Act. However, although the Respondent did not file a summary judgment motion as to the Rehabilitation Act claim, the Court then treated Respondent's objections as a supplemental motion for summary judgment, but denied Henrickson leave to file a second amended complaint. The Court then granted Respondent's supplemental summary judgment. However, Henrickson still had a cause of action for retaliation under the Rehabilitation Act that had survived summary judgment, which he pointed out in Plaintiff's objections to memorandum and recommendation granting Defendant's motion for summary judgment. It was only ***after*** Henrickson pointed out that there was still live claim for retaliation under the rehabilitation act that the Court entered a supplemental memorandum and recommendation granting Defendant's motion for summary judgment regarding Plaintiff's retaliation claim under the Rehabilitation Act. Finally, the Court entered what it determined to be a final judgment and an additional order on Henrickson's Motion on Reconsideration and Rehearing.

II. SUMMARY OF THE ARGUMENT

There are compelling reasons why this Court should grant this Petition for Writ of Certiorari and consider these important questions.

Both the District Court and United States Court of Appeals for the Fifth Circuit decided, erroneously, that Henrickson failed to exhaust his administrative remedies in a timely manner. The Courts determined that Respondent's failure to accommodate Henrickson's disability on a daily basis did not constitute a "continuing violation."

The District Court also erred in determining that Henrickson's retaliation claim under the Rehabilitation Act should be dismissed when Respondent failed to move for summary judgment on that cause of action even after the Court invited Respondent to submit a supplemental summary judgment on that issue.

Henrickson further asserts that in evaluating the summary judgment standard, the District Court inappropriately weighed the evidence in favor of Respondent. In effect, the District Court assumed there were fact issues and went on to assume the role of fact finder. The District Court granted summary judgment on its own factual determinations, which are best left to the proper fact finder, the jury. Therefore, despite the existence of a *prima facie* case, the District Court denied Henrickson his right to a jury trial. The United States Court of Appeals went on to affirm that ruling.

III. REASONS FOR GRANTING WRIT

A. *The Continuing Violation Theory is " Arguably the Most Muddled Area in All of Employment Discrimination"*[2] *and Henrickson Has Brought a Compelling Reason why this Honorable Court should Grant his Petition for Writ of Certiorari.*

This Honorable Court should grant Thomas Henrickson's Petition for Writ of Certiorari because the United States Court of Appeals for the Fifth Circuit has entered a decision in conflict with the decisions of United States Court of Appeals for the Fourth, Sixth and Ninth Circuits and the Supreme Court of California on the continuing violation theory. Supreme Court Rule 10(a).

The Rehabilitation Act incorporates the remedies, procedures, and rights set out in Title VII. 29 U.S.C. § 794a(a)(1); *Ynclan v. Department of the Air Force*, 943 F.2d 1388, 1390 (5th Cir. 1991). Title VII requires a claimant to first exhaust all available administrative remedies before bringing an employment discrimination suit in Federal Court. *Hampton v. Internal Revenue Service*, 913 F.2d 180, 181 (5th Cir. 1990). Federal employees must also comply with the relevant EEOC regulations, which states, "Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age, or handicap must consult a counselor prior to filing a complaint in order to try to informally resolve the matter." 29 C.F.R. § 1614.105(a). The regulations specify that a claimant must initiate contact with an EEO counselor within 45 days of the

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[2] 2 Lindemann & Grossman, Employment Discrimination Law (3d ed. 1996) p. 1351.

date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action. 29 C.F.R. § 1614.105(a)(1). A plaintiff's "failure to notify an EEO counselor in a timely fashion may bar a claim, absent a defense of waiver, estoppel, or equitable tolling." *Pacheco v. Rice*, 966 F.2d 904, 905 (5th Cir. 1992).

The United States Court of Appeals for the Fifth Circuit has held that the continuing violation theory relieves a plaintiff of establishing that all of the conduct complained of occurred within the actionable period if the Plaintiff can show a series of related acts, one or more of which falls within the limitations period. *Huckaby v. Moore*, 142 F.3d 233, 238 (5th Cir. 1998). The Fifth Circuit has acknowledged that although there is no definitive standard for what constitutes a continuing violation, the plaintiff must show more than a series of discriminatory acts. *Id.* at 239. Plaintiff is required to show an organized scheme leading to and including a present violation such that it is the cumulative effect of the discriminatory practice, rather than any discrete occurrence that gives rise to the cause of action. *Id.*; *Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971 (5th Cir. 1983).

The *Berry* test sets forth three factors relevant to the analysis of a continuing violation: subject matter, frequency, and degree of permanence. *Id.* Subject matter instructs courts to consider whether the alleged acts "involve the same type of discrimination, tending to connect them in a continuing violation." *Id.* Frequency asks whether the alleged acts are "recurring . . . or more in the nature of an isolated work assignment or employment decision." *Id.* The third and most important factor in the *Berry* test, degree of permanence, evaluates whether the act possesses "the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights" or which should indicate

that the discrimination will continue "without being dependent on a continuing intent to discriminate." *Id.*

In 2001, the California Supreme Court held that an employer's failure to reasonably accommodate a disability is a continuing violation for purposes of statute of limitations. *Richards v. CH2M Hill, Inc.*, 29 P.3d 175 (Cal. 2001). However, the Court in *Richards* defined permanence to mean that, "an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation will be futile." *Id.*

Henrickson's doctor prescribed a specific medically necessary ergonomic chair for Henrickson that was only available from "Relax the Back" store, which had armrests that are needed to reduce the stress on the elbows, wrists, and shoulders. Henrickson provided Respondent with invoices from "Relax the Back" store for the specified chair and Respondent repeatedly ignored his request for a reasonable accommodation. Henrickson requested the ergonomic chair on June 8, 1998, September 11, 1998, September 28, 1998, November 5, 1998, December 1, 1998, and on a continuing basis. In addition, Henrickson's doctor wrote accommodations for Respondent on November 5, 1998, September 17, 1999, and March 31, 2000. Although respondent failed to accommodate Henrickson on a daily basis, the Southern District of Texas and Fifth Circuit utilized *Berry* to determine that Henrickson's claims of discrimination did not constitute a continuing violation.

Even after Henrickson's repeated requests for accommodation, Respondent made it clear to Henrickson in a letter dated January 20, 1999, that if he did not get more documentation (other the his doctor's already acceptable and

reasonable request for accommodation) then Respondent would consider him AWOL since September 28, 1998 and possibly terminate him. That letter was the adverse action and retaliation for Henrickson requesting a reasonable accommodation. Respondent did not consider Henrickson AWOL on September 28, 1998 but rather after it gave Henrickson the ultimatum in January 1999. As such, Henrickson had timely filed his EEO charge on March 2, 1999, within 45 days of the effective date of the action. 29 C.F.R. § 1614.105(a)(1).

While a few other Circuit Courts have adopted the *Berry* test, the Courts have not uniformly interpreted or applied this test. Most notably, Courts disagree over the permanence factor, questioning exactly what event should trigger a plaintiff that he is being discriminated against.

The Ninth Circuit has done away with the permanence factor altogether as it is utilized in *Berry*. The test in the Ninth Circuit analyzes a course of conduct and looks at whether separate acts of discrimination are "closely enough related" to form a continuing violation. *Counts v. Reno*, 949 F.Supp. 1478, 1484-86 (D.Hawaii 1996); *Fielder v. UAL Corp.*, 218 F.3d 973, 987-88 (9th Cir. 2000).

Still other Circuit Courts utilize a completely different set of factors to determine what constitutes a continuing violation. The Fourth Circuit has held that in order to apply this theory that there must be a "present violation" within the required time period. *Woodard v. Lehman*, 717 F.2d 909, 914-15 (4th Cir.1983). "It is *only* where an actual violation has occurred within that requisite time period that under any possible circumstances the theory of continuing violation is sustainable." *Id.*

The Sixth Circuit articulated the continuing violation theory in *Haithcock v. Frank*, stating that "discriminatory incidents which occur beyond the limitations period are actionable where a plaintiff ... challenges not just one incident ... but an unlawful practice that continues into the limitation period." *Haithcock v. Frank*, 958 F.2d 671, 677 (6th Cir.1992). The Court defined two categories of continuing violations. The first category arises where there is some evidence of present discriminatory activity giving rise to a claim of continuing violation such as where an employer continues to presently imposes disparate work assignments or gives unequal pay for equal work. *Id.* The second category of continuing violation arises where there has occurred a long-standing and demonstrable policy of discrimination. This requires a showing by a preponderance of the evidence "that some form of intentional discrimination against the class of which plaintiff was a member was the company's 'standing operating procedure.' " *EEOC v. Penton Indus. Publ'g Co.*, 851 F.2d 835, 838 (6th Cir.1988).

Due to the fact that the United States Court of Appeals for the Fourth, Fifth, Sixth, and Ninth Circuits along with the Supreme Court of California are in conflict over what constitutes a continuing violation, this Honorable Court should grant Henrickson's Petition for Writ of Certiorari to clarify this issue of law.

B. *Thomas Henrickson has Shown this Court that he Still has a Cause of Action for Retaliation Under the Rehabilitation Act.*

The United States Court of Appeals for the Fifth Circuit and the United States District Court, Southern Division of Texas have so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a

lower court as to call for this Court's supervisory power by granting Summary Judgment on behalf of Respondent for claims that Respondent did not address in its Motion for Summary Judgment.

Plaintiff's Original Complaint - First Amended addressed retaliation as it applied to the Rehabilitation Act. As such, retaliation under the Rehabilitation Act was not a new issue to the Respondent at the time it filed its Motion for Summary Judgment.

The District Court stated on page three of its Memorandum and Recommendation entered on May 22, 2002 that on September 10, 2001[3] a summary judgment was entered in Defendant's favor on Plaintiff's claim under the Rehabilitation Act. This is simply not true. At that time, the Court only summarily dismissed retaliation as it applied to the Americans with Disabilities Act and § 1981 claims. The District Court clearly stated that all claims under the Rehabilitation Act remained. Henrickson had argued retaliation in his Original Complaint - First Amended. At the very least, Plaintiff's claims of retaliation under the Rehabilitation Act remain for trial.

Although the Respondent did not file a summary judgment motion as to the Rehabilitation Act claim, the Court then treated Respondent's Objections to the Memorandum and Recommendation on Defendant's Motion for Summary Judgment as a supplemental motion for summary judgment, but at the very same time denied Henrickson leave to file a

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[3] The Original Complaint – First Amended was filed on September 29, 2000, almost a year before the Court's September 10, 2001 order.

second amended complaint. The Court then granted Respondent's supplemental summary judgment.

However, Henrickson still had a cause of action for retaliation under the Rehabilitation Act that had survived summary judgment, which he pointed out in Plaintiff's objections to memorandum and recommendation granting Defendant's motion for summary judgment. It was only after Henrickson pointed out that there was still live claim for retaliation under the rehabilitation act that the Court entered a supplemental memorandum and recommendation granting Defendant's motion for summary judgment regarding Plaintiff's retaliation claim under the Rehabilitation Act. Finally, the Court entered what it determined to be a final judgment and an additional order on Henrickson's Motion on Reconsideration and Rehearing.

The District Court went out of its way by inviting Respondent to file a supplemental summary judgment to address the causes of action it left out. Even after Respondent chose not to submit a new motion to the Court, the District Court treated Respondent's Objections to the Memorandum and Recommendation on Defendant's Motion for Summary Judgment as a Supplemental Summary Judgment and granted it as to Henrickson's claims.

Even after the Court so far departed from the accepted and usual course of judicial proceedings by inviting Respondent to file a supplemental Summary Judgment, Henrickson had a claim for retaliation under the Rehabilitation Act. The District Court once again departed from the usual course of proceedings to enter another supplemental memorandum and recommendation granting Defendant's motion for summary judgment regarding Plaintiff's retaliation claim under the Rehabilitation Act.

Plaintiff respectfully asserts that the District Court's reasoning regarding Plaintiff's *prima facie* case was incorrect. Moreover, Plaintiff further asserts that in evaluating the summary judgment standard, the District Court inappropriately weighed the evidence in favor of Defendant. In effect, the Court assumed there were fact issues present and went on to assume the role of fact finder. The District Court granted summary judgment on its own factual determinations, which are best left to the proper fact finder, the jury. Therefore, despite the existence of Plaintiff's *prima facie* case, the District Court denied Plaintiff his right to a jury trial.

IV. CONCLUSION

Thomas Henrickson has shown this Court that the United States Court of Appeals for the Fifth Circuit and the United States District Court, Southern Division of Texas have entered a decision that is in conflict with other Appellate Courts and that compelling reasons exist to grant his Petition for Writ of Certiorari. Thomas Henrickson has also shown this Court that the District Court departed from the usual and accepted course of dealings to grant summary judgment in this case. Henrickson met his *prima facie* case of discrimination and retaliation and offered evidence to rebut the "legitimate" business reason offered by John E. Potter, Postmaster General for its actions toward Henrickson. Thomas Henrickson respectfully requests that his Petition for Writ of Certiorari be GRANTED.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-21155

[Filed June 24, 2003]

THOMAS P. HENRICKSON,
Plaintiff - Appellant

v.

JOHN E POTTER, Postmaster General,
Defendant - Appellee

Appeal from the United States District Court
for the Southern District of Texas, Houston

JUDGES: Before HIGGINBOTHAM, SMITH, and CLEMENT, Circuit Judges.

ON PETITION FOR REHEARING

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ _____
Edith Brown Clement
United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-21155, Summary Calendar

[Filed April 23, 2003]

THOMAS P. HENRICKSON,
Plaintiff - Appellant

v.

JOHN E POTTER, Postmaster General,
Defendant - Appellee

Appeal from the United States District Court
for the Southern District of Texas

JUDGES: Before HIGGINBOTHAM, SMITH, and CLEMENT, Circuit Judges.

OPINION

EDITH BROWN CLEMENT, Circuit Judge:

Appellant asserts that the district court erred in granting summary judgment as to his disability discrimination claim. We affirm.

I. FACTS AND PROCEEDINGS

Appellant Thomas Henrickson ("Henrickson") worked for Appellee United States Postal Service ("USPS") from May 25, 1985, to July 19, 2000. On June 21, 1996, Henrickson was diagnosed with carpal tunnel syndrome, which caused him to suffer numbness and tingling in his left and right hands as well as some shooting pain in his left arm. Between 1996 and 1999, Henrickson underwent physical therapy and several medical procedures to alleviate the symptoms of carpal tunnel syndrome.

Dr. Michael G. Brown ("Dr. Brown"), Henrickson's doctor, recommended that Henrickson receive an ergonomic chair with nonstandard armrests in order to reduce stress on his elbows, wrists, and shoulders.[1] Henrickson selected a custom chair from a retail store to suit his needs and requested on May 22, 1998, that USPS purchase the chair for his use.[2] USPS denied his request.[3] Instead, USPS offered

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[1] Following his return from a three-month medical leave in March 1998, Henrickson was given a limited-duty job to accommodate the restrictions on his abilities noted by his doctor, such as "no reaching above shoulder" and "may only work at waist level or below." Henrickson was employed in this position from March 2, 1998, until May 22, 1998.

[2] In his Affidavit, Henrickson asserted that he submitted medical records to USPS on at least five different occasions in 1998. In Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, however, Henrickson cited a meeting on May 22, 1998, with Supervisor Yvonne Edwards, Manager of Distribution Operations Linda Schultz, and Mail Handler M.D.

him a range of alternative chairs that were already available, including several ergonomic chairs with adjustable armrests.[4] R.241. Henrickson refused this offer and insisted on the purchase of the custom chair.[5] Due to the lack of the custom chair, Henrickson refused to report for work beginning on May 22, 1998, until his dismissal on July 19, 2000.[6]

In March 1999, Henrickson initiated contact with an Equal Employment Opportunity ("EEO") counselor regarding his

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Thomas as the only time he requested the custom chair. The record indicates that only Edwards could have authorized the purchase of the custom chair. R.414. The nature of Thomas' position indicates that he did not have such authority, and Schultz explicitly stated that she did not have such authority. R.320.

[3] USPS explained that Dr. Brown only recommended an ergonomic chair with nonstandard armrests and did not order Henrickson to use only the specific model of chair selected by Henrickson.

[4] The alternative chairs included those that were already on the premises and those that USPS had available elsewhere.

[5] According to the Appellee's Brief and his Affidavit, Henrickson refused to even test the suitability of the alternative chairs.

[6] His absence from June 8, 1998, to September 1998 was supported by his doctor's recommendation that he not return to work in order to prevent further re-injury. R.118. Except for this period of time, USPS listed Henrickson as absent without leave (AWOL) beginning on May 22, 1998. According to his Affidavit, Henrickson did not receive any compensation or benefits from USPS subsequent to May 20, 1998.

dispute with USPS over the custom chair. Following the completion of the EEO investigation, the administrative law judge recommended that USPS find that no discrimination had occurred. Subsequently, Henrickson filed a lawsuit in federal district court on May 12, 2000, alleging that USPS failed to accommodate his disability in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101; the Rehabilitation Act, 29 U.S.C. § 701, et seq.; the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, et seq.; and the Civil Rights Act of 1866 and 1871 ("Section 1981"), 42 U.S.C. § 1981.

The district court granted summary judgment in favor of USPS on the claims under: (1) the ADA, because it does not permit discrimination actions against the federal government, 42 U.S.C. § 12111(5)(B), and USPS is a federal employer, 39 U.S.C. § 201 (stating "there is established, as an independent establishment of the executive branch of the Government of the United States, the United States Postal Service"); (2) *Section 1981*, because it does not permit discrimination actions against the federal government, *Eastland v. Tennessee Valley Authority*, 553 F.2d 364, 371 (5th Cir. 1977), and Henrickson did not allege racial discrimination, *Felton v. Polles*, 315 F.3d 470, 473-74 (characterizing Section 1981 as "proscribing racial discrimination in 'making and enforcement' of contracts, including their 'performance' and 'enjoyment of all benefits ... and conditions of the contractual relationship'"); (3) Title VII, because Henrickson showed a protected activity (filing the complaint with the EEO counselor) but not an adverse

employment action in response to his protected activity;[7] and (4) the *Rehabilitation Act*, because Henrickson failed to contact the EEO counselor within 45 days of the alleged discriminatory act.[8] 29 C.F.R. § 1614.105(a)(1).

II. STANDARD OF REVIEW

"A grant of summary judgment is reviewed *de novo* . . . Summary judgment is appropriate when there 'is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.'" *Quorum Health Res., L.L.C. v. Maverick County Hosp. Dist.*, 308 F.3d 451, 458 (5th Cir. 2002) (internal citations omitted) (quoting *Conoco, Inc. v. Medic Systems, Inc.*, 259 F.3d 369, 371 (5th Cir. 2001)). This Court "must view facts and inferences in the light most favorable to the party opposing the motion. A factual dispute precludes a grant of summary judgment if the evidence would permit a reasonable jury to return a verdict for the nonmoving party." *Id.* (internal citations omitted).

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[7] In May 1998, USPS denied Henrickson's requests to purchase the custom chair. Henrickson first contacted the EEO counselor in March 1999. Therefore, the failure to purchase the custom chair cannot be characterized as retaliation in response to a protected activity.

[8] The first alleged discriminatory act (refusal to purchase custom chair) occurred in May 1998, but Henrickson did not contact the EEO counselor until March 1999.

III. DISCUSSION

On appeal, Henrickson challenges the grant of summary judgment in favor of USPS in regards to his claims under the *ADA and the Rehabilitation Act*.

First, Henrickson contends that he established a *prima facie* case of disability discrimination under the ADA. In clear statutory language, Congress established that USPS is part of the federal government, 39 U.S.C. § 201 (stating "there is established, as an independent establishment of the executive branch of the Government of the United States, the United States Postal Service"), and that the entire federal government is excluded from the coverage of the ADA. 42 U.S.C. § 12111(5)(B) (stating that "the term 'employer' does not include the United States [or] a corporation wholly owned by the government of the United States"). Therefore, whether Henrickson established a *prima facie* case of disability discrimination under the ADA is irrelevant because no such claim is permitted under the statute against USPS.

Second, Henrickson concedes that "it is undisputed that all of Complainant's allegations fall outside of the 45-day time limit" for contacting an EEO counselor.[9] R.171. This statement recognizes that he had no viable claims under the *Rehabilitation Act* because he failed to contact the EEO

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[9] In Plaintiff's Response in Opposition to Defendant's Amended Motion and Amended Memorandum to Dismiss Plaintiff's Original Complaint - First Amended, Henrickson discussed a "letter allegation" that allegedly did not fall outside the 45-day limit. R.171. On appeal, however, Henrickson did not raise the "letter allegation."

counselor within 45 days of the alleged discriminatory act. 29 C.F.R. § 1614.105(a)(1).

On appeal, Henrickson seeks to escape his failure to act within the 45-day limit by alleging a "continuing violation." Plaintiffs asserting continuing violations "must demonstrate more than a series of discriminatory acts. [They] must show an organized scheme leading to and including a present violation such that it is the cumulative effect of the discriminatory practice, rather than any discrete occurrence, that gives rise to the cause of action." *Huckabay v. Moore*, 142 F.3d 233, 239 (5th Cir. 1998) (internal citations omitted). This language indicates that Henrickson must, at a minimum, demonstrate that there was a series of alleged discriminatory acts.

The alleged discriminatory act of which Henrickson complains is the denial of his request for the custom chair. By his own admission, Henrickson only requested the custom chair on a single occasion. Therefore, Henrickson failed to meet the bare minimum of requirements for establishing a continuing violation.[10]

Alternatively, Henrickson identifies being listed as "absent without leave" (AWOL) status as the allegedly discriminatory act. Beginning on May 22, 1998, Henrickson refused to report for work. As a result, USPS listed Henrickson as AWOL beginning on May 22, 1998. "The focus is on what

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[10] Henrickson claims that he submitted medical records and other materials on multiple occasions. However, he only requested the custom chair on a single occasion.

event, in fairness and logic, should have alerted the average lay person to act to protect his rights." *Id.* at 238 (citing *Messer v. Meno*, 130 F.3d 130, 134-35 (5th Cir. 1997)). The initial listing of Henrickson on AWOL status should have alerted Henrickson to act to protect his rights. *Id.* Therefore, Henrickson had 45 days from the initial listing on May 22, 1998, to contact an EEO counselor. By his own admission, he did not contact an EEO counselor until March 1999 and thus failed to meet the deadline.

Furthermore, the jurisprudence of this Court indicates that continuing to list Henrickson as AWOL until his termination on July 19, 2000, did not constitute a "continuing violation." *Id.* at 239 n.3 (holding that the "mere receipt of a [biweekly] paycheck [did] not constitute a 'continuing act' of discrimination"). Therefore, Henrickson failed to meet the bare minimum of requirements for establishing a continuing violation.

IV. CONCLUSION

Viewing facts and inferences in the light most favorable to Henrickson, it is clear that there is no genuine issue as to any material fact, and USPS is entitled to judgment as a matter of law. The judgment of the district court is AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-00-1620

[Filed July 3, 2002]

THOMAS R. HENRICKSON, Plaintiff,	)
vs.	)
JOHN E. POTTER, POSTMASTER GENERAL OF THE U.S. POSTAL SERVICE, Defendant.	)

ORDER ADOPTING MEMORANDUM AND RECOMMENDATION

On September 10, 2001, a summary judgment in defendant's favor was entered dismissing plaintiff Thomas Henrickson's request for punitive damages; his claims under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.;* his claims under 42 U.S.C. § 1981; and his retaliation claim under Title VII, 42 U.S.C. § 2000e *et seq*. The Magistrate Judge has now recommended that summary judgment be granted on plaintiff's claims under the

Rehabilitation Act, 42 U.S.C. § 701, *et seq.* This court has reviewed the Memorandum and Recommendation of the United States Magistrate Judge signed on May 22, 2002; the objections filed by plaintiff; the Supplemental Memorandum and Recommendation filed by the Magistrate Judge signed on June 18, 2002; and plaintiff's objections to the Supplemental Memorandum and Recommendation. This court has made a *de novo* determination of the Magistrate Judge's recommended disposition. Rule 72(b), Fed. R. Civ. P.; 28 U.S.C. § 636(b)(1)(C); *United States v. Wilson*, 864 F.2d 1219 (5th Cir. 1989. Based on a careful review of the Magistrate Judge's detailed and painstaking analysis of plaintiff's claims; of the pleadings, the motion for summary judgment and response; the record; and the applicable law, this court finds that the Memorandum and Recommendation, with the clarification and change made by the Supplemental Memorandum and Recommendation, should be, and the same are hereby, adopted as this court's Memorandum and Order. It is therefore ordered that summary judgment be entered in favor of the defendant as to plaintiffs remaining claims. Final judgment will be entered by separate order in favor of the Postal Service.

SIGNED on July 2, 2002, at Houston, Texas.

/s/ _____
Lee H. Rosenthal
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-00-1620

[Filed July 3, 2002]

THOMAS R. HENRICKSON, Plaintiff,	)
vs.	)
JOHN E. POTTER, POSTMASTER GENERAL OF THE U.S. POSTAL SERVICE, Defendant.	)

FINAL JUDGMENT

In accordance with the court's Order Adopting Memorandum and Recommendation of even date, this action is DISMISSED with PREJUDICE.

This is a Final Judgment.

SIGNED on July 2, 2002, at Houston, Texas.

/s/ _____
Lee H. Rosenthal
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-00-1620

[Filed June 18, 2002]

THOMAS R. HENRICKSON,	)
Plaintiff,	)
	)
vs.	)
	)
JOHN E. POTTER, POSTMASTER GENERAL OF THE U.S. POSTAL SERVICE,	)
Defendant.	)
	)

SUPPLEMENTAL MEMORANDUM
AND RECOMMENDATION ON
DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

This case was referred by United States District Judge Lee H. Rosenthal for pretrial management, under 28 U.S.C. § 636 (b)(1)(A) and (B). (Docket Entry # 20). On May 22, 2002, it was recommended that the court grant the motion for summary judgment filed by Defendant United States Postal Service ("Defendant," the "Postal Service"). (Memorandum

and Recommendation Granting Defendant's Motion for Summary Judgment ["May 2002 Memorandum"], Docket Entry #42). Plaintiff Thomas Henrickson ("Plaintiff," "Henrickson") has made objections to the recommendation. (Plaintiff's Objections to Memorandum and Recommendation Granting Defendant's Motion for Summary Judgment ("Plaintiff's Objections"), Docket Entry #43). Having reviewed Plaintiff's objections, this court considered, again, the evidence of record and concludes that it is appropriate to supplement the previous findings, but that it need not alter the recommendation. In deference to Plaintiff's objections, however, the record should be clarified.

Plaintiff raises two objections to the recommendation that Defendant's motion be granted. First, he claims that this court improperly rejected the allegation that he was retaliated against in violation of the Rehabilitation Act. (Plaintiffs Objections at 3, 6). He argues that, although the recommendation stated, incorrectly, that "a summary judgment was entered in Defendant's favor on Plaintiff's claim under the Rehabilitation Act [his] claims of retaliation under the Rehabilitation Act remain for trial." *(Id.* at 3). Second, Henrickson claims that the doctrine of equitable estoppel should allow him to proceed with any Rehabilitation Act claim that would otherwise be barred by the administrative limitations period. *(Id.* at 4). Henrickson complains that, rather than implementing this equitable rule in his favor, the court erroneously determined that he had waived that argument. *(Id.)*.

It is true, as Plaintiff notes, that the procedural history of this case was summarized in a manner which indicated that

his retaliation claim was made, and disposed of, "under the Rehabilitation Act," 42 U.S.C. § 701, *et seq.* (May 2002 Memorandum at 3). Actually, Henrickson's pending compiaint does not specify the statutory basis for his retaliation claims, and the court assumed it was attendant to his action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq. (See* Memorandum and Recommendation on Defendant's Motion for Summary Judgment ["July 2001 Memorandum"] at 15-17, Docket Entry # 27). In his objections, Henrickson appears to clarify that he seeks to pursue a retaliation claim under the Rehabilitation Act, instead of Title VII. (Plaintiffs' Objections at 3). Plaintiff's argument, however, dodges the fundamental fact that the Rehabilitation Act incorporates the remedies, procedures, and rights that are set out in Title VII. *See* 29 U.S.C. § 794a(a)(1); *Ynclan v. Dep't of the Air Force,* 943 F.2d 1388, 1390 (5th Cir. 1991); *Prewitt v. U.S. Postal Serv.,* 662 F.2d 292, 303 (5th Cir. 1981); *Boyd v. U.S. Postal Serv.,* 752 F.2d 410, 412 (9th Cir. 1985); *McGuinness v. U.S. Postal Serv.,* 744 F.2d 1318, 1320 (7th Cir. 1984). This precept has been long settled. *See id.* It follows that an analysis of Plaintiff's retaliation claim, under the Rehabilitation Act, is the same as that used to address his Title VII complaint. *See id.* Under that rubric, a plaintiff must be able to show a causal connection between a purportedly protected activity and the complained of adverse employment action. *Byers v. Dallas Morning News, Inc.,* 209 F.3d 419,427 (5th Cir. 2000); *Sherrod v. American Airlines,* 132 F.3d 112, 1122 n.8 (5th Cir. 1998); *Dollis v. Rubin,* 77 F.3d 777, 781 (5th Cir. 1995). In this court's earlier memorandum, it was determined that Henrickson had not established that he was subjected to any adverse employment action after he filed

his discrimination complaint. (July 2001 Memorandum at 16; *and see* Docket Entry #38). Plaintiff now urges the court to view a letter from the Postal Service, written on January 20, 1999, as such an adverse action. (Plaintiff's Objection at 6). The pertinent portion of that letter is set out below:

> This correspondence is in reference to your absence from duty since September 28, 1998. A certified letter.., dated November 19, 1998, was mailed to your address on record instructing you to report to work or provide acceptable documentation ....To date you have failed to comply with the directive. Therefore, your absences since September 28, 1998 have been charged to AWOL. Your continued failure to comply with the directive will result in appropriate disciplinary action up to and including removal from the Postal Service.

(July 2001 Memorandum at 10).

In this circuit, it has been held repeatedly that an employer's acts must "constitute ultimate employment decisions" to be considered "adverse employment actions," in violation of Title VII. *See, e.g., Mattern v. Eastman Kodak Co.,* 104 F.3d 702,707 (5th Cir. 1997); *Dollis v. Rubin,* 77 F.3d 777, 781-82 (5th Cir. 1995). These "ultimate employment decisions" include such things as "hiring, granting leave, discharging, promoting, and compensating." *Fierros v. Tex. Dep't of Health,* 274 F.3d 187, 191 (5th Cir. 2001); *Mattern,* 104 F.3d at 707; *Dollis,* 77 F.3d at 782. The United States Court of Appeals for the Fifth Circuit has often explained, however, that Title VII was not designed "to

address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." *Messer v. Meno,* 130 F.3d 130, 139 (5th Cir. 1997); *Mattern,* 104 F.3d at 707; *Dollis,* 77 F.3d at 781-82; *see also Fierros,* 274 F.3d at 191. The January 1999 letter that Plaintiff relies upon does not declare any action by the Postal Service, other than a designation of his absence as "AWOL." There is no evidence before the court as to the consequences, if any, that flow from a determination that a Postal Service employee is AWOL. Plaintiff has not presented any evidence, or any argument, that such a designation, in itself, rises to the level of an adverse employment action. In fact, he states that "[t]he Postal Service does not have any particular policy as to how long an employee can be AWOL before [he is] fired." (Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment ["Response to Motion for Summary Judgment"] at 5, Docket Entry #25). It does not appear that the cited letter constitutes an inherent disciplinary action. It is merely a warning that discipline might result if Henrickson continued to miss work without the required explanation. Under Fifth Circuit law, therefore, the January 1999 letter was not an"ultimate employment decision." *See Fierros,* 274 F.3d at 191; *Messer,* 130 F.3d at 139; *Mattern,* 104 F.3d at 707; *Dollis,* 77 F.3d at 781-82. Accordingly, Plaintiff has not met his burden to show prima facie evidence of retaliation, under either statute, and it is RECOMMENDED that Defendant's motion for summary judgment should be GRANTED on the retaliation claim.

Next, Plaintiff argues that, contrary to this court's determination, any claims that arose before January 15, 1999, are not barred by the administrative time limits. (Plaintiff's

Objections at 4). Plaintiff complains that, in making its findings, this court did not consider whether the doctrines of estoppel or equitable tolling applied to his Rehabilitation Act claims. *(Id.)*. A party claiming equitable estoppel or equitable tolling bears the burden to justify the application of those doctrines. *Hood v. Sears Roebuck & Co.*, 168 F.3d 231,232 (5th Cir. 1999); *Rhodes v. Cruiberson Oil Tools Division*, 927 F.2d 876, 879 (5th Cir. 1991). The doctrine of equitable estoppel prevents an employer "from asserting the filing period if the employer misrepresented or concealed 'facts necessary to support a discrimination charge." *Rhodes*, 927 F.2d at 878-79 (quoting *Pruet Prod. Co. v. Ayles*, 784 F.2d 1275, 1280 (5th Cir. 1986)). In contrast, "[e]quitable tolling focuses on the plaintiff's excusable ignorance of the employer's discriminatory act." *Id.* at 878 (quoting *Felty v. Graves-Humphreys, Co.*, 785 F.2d 516,519 (4th Cir. 1986)); *see also Hood*, 168 F.3d at 232. Here, Henrickson makes no claims that he was ignorant of the law's requirements or that the Postal Service misrepresented any facts. Instead, he argues that he "is not time barred from any of his EEOC claims because Defendant's acts constituted a 'continuing violation.'" (Plaintiff's Objections at 4; *see also* Plaintiff's Response in Opposition to Defendant's Motion to Dismiss at 3, Docket Entry #11; Plaintiff's Response in Opposition to Defendant's Amended Motion and Amended Memorandum to Dismiss Plaintiff's Original Complaint--First Amended at 3, Docket Entry #19; Response to Motion for Summary Judgment at 11). His contention that he suffered from a "continuing violation" was addressed in detail, and rejected, in this court's July 2001 memorandum. (July 2001 Memorandum at 19-22). There is no need to revisit those arguments. Further, Henrickson has not cited any evidence or

raised any argument on an equitable bar to the regulatory time limits. *See Hood,* 168 F.3d at 232; *Rhodes,* 927 F.2d at 878-79. Even crediting Plaintiff's objections, he has not raised a genuine question of material fact on his claims under the Rehabilitation Act. It is RECOMMENDED, therefore, that Defendant's motion be GRANTED, as to these claims.

Conclusion

Based on the foregoing, it is RECOMMENDED that the motion by the United States Postal Service for summary judgment be GRANTED.

It is further RECOMMENDED that page three of the May 2002 Memorandum should be amended to read as follows:

> On September 10, 2001, a summary judgment in Defendant's favor was entered on Plaintiff's request for punitive damages; his claims under the ADA and § 1981; and on the claim of retaliation, under Title VII. (Order Adopting Memorandum and Recommendation and Setting Deadline for Response, Docket Entry #38). At that time, the district court found that Defendant had raised new arguments, not previously considered by this court, on Plaintiff's remaining claims. *(Id.* at 2). The district court then designated these new contentions, which address Plaintiff' s claims under the Rehabilitation Act, as a supplemental motion for summary judgment. After a review of that motion, the evidence provided, and the relevant law, it is RECOMMENDED that the

supplemental motion be GRANTED, and that a final judgment be entered in favor of the Postal Service.

The Clerk of the court shall enter this memorandum and recommendation and provide a true copy to the respective parties who will then have ten (10) days from the receipt of it to file written objections thereto, pursuant to 28 U.S.C. § 636(b)(1)(C), General Order 80-5, S.D. Texas. **Any further objections are to address only the amendments and supplements to the original memorandum and recommendation.** Failure to file written objections within the time period provided shall bar an aggrieved party from attacking the factual findings or legal conclusions on appeal.

The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas 77208; copies of any such objections shall be delivered to the chambers of Judge Lee H. Rosenthal, Room 11535, and to the chambers of the undersigned, Room 7007.

SIGNED at Houston, Texas, this 18th day of June 2002.

/s/ _____
Mary Milloy
United States Magistrate Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-00-1620

[Filed May 22, 2002]

THOMAS R. HENRICKSON,	)
Plaintiff,	)
	)
vs.	)
	)
JOHN E. POTTER, POSTMASTER	)
GENERAL OF THE U.S. POSTAL	)
SERVICE,	)
Defendant.	)
	)

MEMORANDUM AND RECOMMENDATION
GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

This case was referred by United States District Judge Lee H. Rosenthal for pretrial management, under 28 U.S.C. § 636 (b)(1)(A) and (B). (Docket Entry # 20). Pending before the court is a motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, that was filed by Defendant John E. Potter, Postmaster General of the United

States Postal Service ("Defendant," the "Postal Service").[1] (Defendant's Objections to Memorandum and Recommendation on Defendant's Summary Judgment ["Defendant's Second Motion"], Docket Entry #35). Plaintiff Thomas Henrickson ("Plaintiff," "Henrickson") has responded in opposition to Defendant's motion. (Plaintiff's Response in Opposition to Defendant's Second Motion for Summary Judgment, ["Plaintiff's Second Response"], Docket Entry #39). After reviewing the pleadings, the relevant evidence and the applicable law, it is RECOMMENDED that Defendant's motion for summary judgement be GRANTED.

Background

Henrickson filed this lawsuit on May 12, 2000, alleging that he suffers from carpal tunnel syndrome in both hands, left ulna nerve entrapment, and a right rotator cuff tear. (Complaint, Docket Entry #1; Original Complaint--First Amended ["First Amended Complaint"] ¶ 5.6.2, Docket Entry #13). Plaintiff complains that, because of these impairments, he asked his employer, the United States Postal Service, to provide him with a "medically prescribed, ergonomic chair with armrests." (First Amended Complaint ¶¶ 5.6.4-5.6.7). Defendant did not do so, and Plaintiff alleges that such conduct was an unlawful failure to accommodate his disability. *(Id.* ¶¶ 5.6.8, 5.6.11-5.6.17). In his First Amended Complaint, Plaintiff claimed that this failure to accommodate

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[1] John E. Potter is substituted for William J. Henderson as the Postmaster General of the United States of America, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

him was a violation of Texas common law and the following federal statutes: 42 U.S.C. 812101 *et seq.*, the Americans. with Disabilities Act ["ADA"]; 29 U.S.C. 8701, *et seq.*, the Rehabilitation Act; 42 U.S.C.82000e *et seq.*, the Civil Rights Act of 1964; and 42 U.S.C. 8 1981, the Civil Rights Act of 1866 and 1871 ["8 1981"]. *([d.* ¶¶ 1.2 - 1.5, 5.7.1-5.7.5). Henrickson also alleged that Defendant violated these statutory provisions, in additional ways, by denying his request for a "continuation of pay"; by designating him "absent without leave"; and by retaliating against him after he filed a charge with the Equal Employment Opportunity Commission ["EEOC"].[2] *(Id.* ¶¶ 5.6.18, 5.6.20).

On February 16, 2001, Defendant moved for summary judgment, arguing that all of Plaintiff's claims should be dismissed.[3] (Defendant's Motion for Summary Judgment ["Defendant's First Motion"], Docket Entry #23). On September 10, 2001, a summary judgment in Defendant's favor was entered on Plaintiff's request for punitive damages; his claims under the ADA and § 1981; and on the claim of retaliation under the Rehabilitation Act. (Order Adopting Memorandum and Recommendation and Setting Deadline for

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[2] Previously, Henrickson alleged that the Postal Service retaliated against him because he filed this suit, but that claim was abandoned. (Plaintiffs Response at 7).

[3] The facts relevant to Plaintiff's claims are detailed m the memorandum and recommendation issued on July 21, 2001. (Memorandum and Recommendation on Defendant's Motion for Summary Judgment *["July 2001 Memorandum"],* Docket Entry #30).

Response, Docket Entry #38). At that time, the district court found that Defendant had raised new arguments, not previously considered by this court, on Plaintiff's remaining claims. *(Id.* at 2). The district court then designated these new contentions, which address Plaintiff's remaining claims under the Rehabilitation Act, as a supplemental motion for summary judgment. *(Id.)*. After a review of that motion, the evidence provided, and the relevant law, it is RECOMMENDED that the supplemental motion be GRANTED, and that a final judgment be entered in favor of the Postal Service.

Standard of Review

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Under Rule 56(c), the moving party bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue for trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *Norman v. Apache Corp.,* 19 F.3d 1017, 1023 (5th Cir. 1994). The party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, but need not negate the elements of the non-movant's case. *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir. 1994). If the moving party fails to meet its initial burden, the motion for summary judgment must be denied, regardless of the non-movant's response. *Id.* When the moving party has met its Rule 56 burden, the non-movant cannot survive a motion for summary judgment by resting merely on the allegations in its pleadings. *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.,* 66 F.3d 89,

92 (5th Cir. 1995). If the movant does meet his burden, the non-movant must go beyond the pleadings and designate specific facts to show that there is a genuine issue for trial. *Little,* 37 F.3d at 1075. Further, the non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Webb v. Cardiothoracic Surgery Assocs.,* 139 F.3d 532, 536 (5th Cir. 1998) *(citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986)).

To meet its burden, the nonmoving party must present "significant probative" evidence indicating that there are issues of fact remaining for trial. *Conkling v. Turner,* 18 F.3d 1285, 1295 (5th Cir. 1994). If the evidence presented to rebut the summary judgment motion is only colorable or not significantly probative, summary judgment should be granted. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242,249-250. (1986). But, in deciding a summary judgment motion, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [his] favor." *Id.* at 248. However, "Rule 56 mandates the entry of summary judgment, after adequate time for discovery, and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of poof at trial." *Little,* 37 F.3d at 1075.

Discussion

In this court's earlier memorandum, it concluded that only one of Henrickson's Rehabilitation Act claims had been timely filed with an Equal Employment Opportunity counselor

("EEO counselor"). (Memorandum and Recommendation on Defendant's Motion for Summary Judgment *["July 2001 Memorandum"]* at 18, 22, Docket Entry #30) (citing 29 C.F.R. § § 1614.105, 1614.106(d)(2); *Pacheco v. Rice,* 966 F.2d 904, 905 (5th Cir. 1992); *Henderson v. U.S. Veterans Admin.,* 790 F.2d 436, 439-40 (5th Cir. 1986)). That allegation set out Henrickson's contention that the Postal Service failed to accommodate his disability on January 25, 1999. *Id.* at 22, 26. In addition, the parties' pleadings presented a fact question on whether the Postal Service had waived a limitations bar, under the EEOC guidelines, on any claim that arose before January 15, 1999. *Id.* at 24 (citing 29 C.F.R. § 1614.105(a)(2); *Henderson,* 790 F.2d at 441). The parties were instructed to submit new briefs on those matters. *Id.* at 26, 27.

In the pending motion, the Postal Service contends that it did not waive any of the regulatory requirements in assessing Plaintiff's assertions. (Defendant's Second Motion at 2). In fact, Defendant asserts that it "argued, at the administrative stage, that Plaintiff's claims should be dismissed as untimely." *(Id.)* (citing Response to Notice Regarding Findings of Fact and Conclusions of Law Without a Hearing ["Defendant's EEOC Response"] at 6, EEOC Case No. 330-AG-8050X, *attached as* Exhibit 1 to Defendant's Second Motion). The Postal Service argues further that even if his claim was timely filed, Plaintiff did not request an accommodation on January 25, 1999, "but merely reargued old issues." (Defendant's Second Motion at 4). Henrickson has not responded to these arguments directly. *(See generally* Plaintiff's Second Response). Instead, he insists that he has set out a prima facie case of discrimination, and that judgment

for Defendant, at this stage of the proceedings, "is not proper." *(Id.* at 12).

Waiver of Limitations

As was discussed earlier, a federal employee must exhaust all available administrative remedies and comply with all relevant EEOC regulations before he may bring an employment discrimination suit in a federal court. *Hampton v. Internal Revenue Svc.*, 913 F.2d 180, 181 (5th Cir. 1990). EEOC regulations require a claimant to "initiate contact with a counselor within 45 days of the date of the matter alleged to be discriminatory." 29 C.F.R. § 1614.105(a)(1). If the matter cannot be resolved informally, after a mandatory counseling period, then the claimant may file a discrimination complaint with the employer agency, *Id.* § § 1614.105 (d), 1614.106 (a). The agency is then obligated to investigate the complaint, and to provide the complainant with a copy of the investigative file. *Id.* § 1614.108(a), (f). Upon receipt of that file, the complainant has the right to request a hearing and a decision from an administrative law judge ("ALJ"). *Id.* § 1614.108(f). The ALJ may issue a decision without a hearing ("summary judgment") if she determines that there is no genuine dispute on any issue of material fact. *Id.* § 1614.109(g). If the employer agency does not issue a final order within 40 days after receipt of the ALJ's decision, then that decision serves as the final agency action. *Id.* § § 1614.109(i), 1614.110(a). The complainant may appeal the final agency action to the EEOC, or, in the alternative, may file a civil action in a federal district court. *Id.* § 1614.110. But it is well-settled that a plaintiff's initial "failure to notify an EEO counselor in a timely fashion may bar a claim, absent

a defense of waiver, estoppel, or equitable tolling." *Pacheco,* 966 F.2d at 905; *Henderson,* 790 F.2d at 439-40; *see also Abrams v. Baylor College of Medicine,* 805 F.2d 528, 532 (5th Cir. 1986).

Here, Henrickson claims that he asked the Postal Service to accommodate his alleged disability on several different occasions, between May 1998 and January 1999. (First Amended Complaint ¶¶ 5.6.5-5.6.10). However, he did not contact an EEO counselor until March 2, 1999. *July 2001 Memorandum* at 19. "[A]bsent a defense of waiver, estoppel, or equitable tolling," Plaintiff is barred from asserting, before this court, any claim based on events that occurred more that 45 days prior to that date. 29 C.F.R. § 1614.105(a)(1) *Pacheco,* 966 F.2d at 905; *Henderson,* 790 F.2d at 439-40. Henrickson does not argue that estoppel or equitable tolling applies, and so this court assumes that the only applicable defense is that of waiver. Considering this defense, the United States Court of Appeals for the Fifth Circuit has repeatedly rejected the argument that a "federal agency, by *merely* accepting and investigating a tardy complaint, *automatically* waives its objection to the complainant's failure to comply with the prescribed time delays." *Henderson,* 790 F.2d at 441 (quoting *Oaxaca v. Roscoe,* 641 F.2d 386,390 (5th Cir. 1981)). The court held that an agency which "inadvertently overlook[ed] timeliness problems," during an inquiry into a claim of employment discrimination, should not be bound by that mistake if the claim is later brought to a federal court. *Id.* Instead, an employer agency is deemed to have waived a time bar only if it "fully investigated the timeliness of the complaint and found a satisfactory reason for the delay." *Id.*

In this instance, the Postal Service conducted an inquiry into Henrickson's claims that he was not given an accommodation for his alleged disability on May 22, 1998; on September 9, 1998; on September 28, 1998; on December 27, 1998; and on January 21, 1999; and on January 25, 1999.[4] (Exhibit to Memorandum in Support of Defendant's Motion for Summary Judgment ["Exhibit to Defendant's First Motion"], pp. 7, 10, Docket Entry #24). Following the inquiry, Henrickson requested a hearing before an EEOC Administrative Law Judge. (First Amended Complaint ¶ 5.6.12; Defendant's EEOC Response at 1). On January 5, 2000, ALJ Mona F. Read notified the parties that she intended to review Henrickson's discrimination claims without a hearing. (Defendant's EEOC Response at 1). The Postal Service responded to that notice by arguing, among other things, that it was "entitled to summary judgment as a matter of law because [Henrickson] failed to timely contact an EEO counselor." *(Id.* at 6). On February 11, 2000, ALJ Mona F. Read denied Henrickson's claims. (Exhibit to Defendant's First Motion, pp. 21-24, ALJ's Decision, EEOC Case No. 330-AG-8050X). In her decision, the AIA noted that Henrickson's claim that the Postal Service failed to accommodate his disability had been adjudicated previously by the Department of Labor, Office of Workers Compensation (the "Department"). *(Id.* at 22). She determined further that the Department had found that Henrickson "had not provided sufficient evidence to show that

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[4] The record is not clear on the specific result of the Postal Service inquiry. The court assumes that Plaintiff did not find it to be favorable.

the ergonomic chair he requested was essential for his return to work." *(Id.)*. The ALJ then observed that a claimant can pursue a discrimination claim before the EEOC "only to the extent the claim is not a collateral attack on [a] determination by the Department." *(Id.)*. She concluded, therefore, that all of Henrickson's accommodation complaints were "a collateral attack on the Department's ruling and [could] not be sustained as stating a cause of action." *(Id.)*. *In* addition, the ALJ found that Henrickson "was ineligible for continuation of pay because his injury claim is for an occupational disease and not a claim for traumatic injury," a requirement under the Federal Employees Compensation Act. *(Id.)*. For those reasons, the ALJ held that Henrickson had failed to state a claim on that complaint, as well. *(Id.)*. Accordingly, she recommended a final agency decision that "no discrimination" had occurred. *(Id.)*.

Here, there is no evidence that the Postal Service investigated whether Henrickson's complaint was timely filed when it conducted its inquiry on his claims of employment discrimination. *See Henderson,* 790 F.2d at 441. Nor did the ALJ make findings on that matter, although Defendant clearly contested the timeliness of Plaintiff' s complaint at the time of her review. R appears that neither the Postal Service nor the EEOC made a determination that Henrickson's delay in filing a claim was justifiable. Because the record is silent on the issue of timeliness, the court concludes that the Postal Service has not waived the limitations period, and is not therefore, precluded from raising a time-bar defense. *See id.* On this record, the court finds that Henrickson has not raised any genuine issues of material fact on this matter, and it is RECOMMENDED that Defendant's motion for summary

judgment be GRANTED on all Rehabilitation Act claims that arose before January 15, 1999.

January 1999 "Failure to Accommodate"

Plaintiff has one remaining claim which is not time-barred: he contends that the Postal Service failed to accommodate his alleged disability, in late January 1999, in violation of the Rehabilitation Act. (First Amended Complaint ¶ 5.6.11). He says that the Postal Service requested "new 'proof' of [his] disability," on January 21, 1999. (First Amended Complaint¶ 5.6.9). Plaintiff maintains that, four days later, he did, in fact, return such "proof" to his employer, but the Postal Service "again failed to accommodate" him. *(Id.* ¶¶ 5.6.10, 5.6.11). Defendant contests this assertion, however, and insists that Henrickson "did not submit new documentation or request a new accommodation in January 1999." (Defendant's Second Motion at 5).

Apparently, Henrickson's claim is based on a letter from Monique Nguyen, a representative of the Postal Service Administrative Support Office in Houston, Texas. *(See* Exhibit to Defendant's First Motion at 26). Her letter informed him that:

> This correspondence is in reference to your absence from duty since September 28, 1998. A certified letter.., dated November 19, 1998, was mailed to your address on record instructing you to report to work or provide acceptable documentation .... To date you have failed to comply with the directive.

> Therefore, your absences since September 28, 1998 have been charged to AWOL. Your continued failure to comply with the directive will result in appropriate disciplinary action up to and including removal from the Postal Service.

(Id.). Ms. Nguyen signed the letter on January 20, 1999, and Henrickson received it the following day. *(Id.* at 26, 27). In his deposition, Plaintiff testified that he responded to Ms. Nguyen's letter "about a week later," in a visit to the office of United States Senator Kay Bailey Hutchinson. (Defendant's Second Motion, Ex. 2: Oral Deposition of Thomas R. Henrickson, Feb. 14, 2001, Vol. 2 ["Henrickson Depo."], pp. 85-87). Reportedly, a member of the Senator's staff initiated a conference call with Henrickson and Ms. Nguyen. *(Id.* at 85, 87). Plaintiff testified that, in that telephone call, he told Ms. Nguyen that "the medical documentation on 9/28/1998 stated.., that the only way I could return back to work is with the prescribed chair that should have been ordered." *(Id.* at 86). Henrickson does acknowledge, however, that he never sen[t] additional documentation in to Ms. Nguyen to support [his] absence." *(Id.* at 85). On this record, Henrickson's telephone conversation with Ms. Nguyen may be best described as a request that the Postal Service reconsider his September 28, 1998, demand for a specific ergonomic chair. But there is no evidence to support Henrickson's allegation that he submitted an "update regarding 'proof' of [his] disability" to the Postal Service on January 25, 2000. (First Amended Complaint ¶ 5.6.10). Nor is there any evidence that he requested an accommodation for his purported disability on that date, or indeed, at any other time during the relevant period. For that reason, the court

concludes that Plaintiff has not stated a claim for a violation of his rights, under the Rehabilitation Act, based on any events in January 2000. Accordingly, it is RECOMMENDED that Defendant's motion for summary judgment be GRANTED.

Conclusion

Based on the foregoing, it is RECOMMENDED that the motion by the United States Postal Service for summary judgment be GRANTED.

The Clerk of the court shall enter this memorandum and recommendation and provide a true copy to the respective parties who will then have ten (10) days from the receipt of it to file written objections thereto, pursuant to 28 U.S.C. § 636(b)(1)(C), General Order 80-5, S.D. Texas. Failure to file written objections within the time period provided shall bar an aggrieved party from attacking the factual findings or legal conclusions on appeal.

The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas 77208; copies of any such objections shall be delivered to the chambers of Judge Lee H. Rosenthal, Room 11535, and to the chambers of the undersigned, Room 7007.

SIGNED at Houston, Texas, this 22nd of May 2002.

/s/ _____
Mary Milloy
United States Magistrate Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-00-1620

[Filed September 11, 2001]

THOMAS R. HENRICKSON, Petitioner,	)
vs.	)
WILLIAM HENDERSON, POSTMASTER GENERAL OF THE U.S. POSTAL SERVICE, Respondent.	)

ORDER ADOPTING MEMORANDUM AND RECOMMENDATION AND SETTING DEADLINE FOR RESPONSE

This court has reviewed the Memorandum and Recommendation of the United States Magistrate Judge signed on July 21, 2001. The court has also considered the objections of plaintiff and of defendant and made *a de novo* determination of that portion of the magistrate judge's recommended disposition. Rule 72(b), Fed. R. Civ, P,; 28

U.S.C. § 636(b)(1)(C); *United States v. Wilson*, 864 F.2d 1219 (5th Cir. 1989).

This court finds the Memorandum and Recommendation should be, and the same is hereby, adopted as the court's Memorandum and Order. This court enters the following orders:

Defendant's motion for summary judgment is GRANTED as to plaintiff's claim of retaliation; fight to punitive damages; and claims under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, and section 1981, 42 U.S.C. § 1981. Those claims are DISMISSED.

Defendant's motion for summary judgment as to plaintiff's claim under the Rehabilitation Act, 42 U.S.C. § 701, *et seq.*, is DENIED, without prejudice. Defendant has submitted what is termed an objection to the magistrate judge's memorandum and recommendation, but which raises arguments and rests on grounds not raised before, or addressed by, the magistrate judge. This court will treat the defendant's objection as an additional motion for summary judgment and will allow plaintiff 10 days from the date of this order to respond.

Plaintiff also filed a motion after the magistrate judge issued her memorandum and recommendation. That motion sought leave to file a second amended complaint, to include an allegation that defendant's discharge of plaintiff was retaliation for protected activity, Defendant has filed a response in opposition. In the response, defendant points out that the attempted amendment injects a new issue into the case; is very late in the litigation; is futile because it has not been subject to administrative exhaustion; and would unduly

prejudice defendant by evading the administrative investigation and resolution mechanisms. Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend pleadings "shall be freely given when justice requires." FED. R. Civ. P. 15(a). "[T]he district court may consider factors such a whether there has been 'undue delay, bad faith or dilatory motive... undue prejudice to the opposing party, and futility of amendment.'" *Jacobsen v. Osborne*, 133 F.3d 315, 318 (5th Cir. 1998) (quoting *In re Southmark Corp.*, 88 F.3d 311, 314-15 (5th Cir. 1996)). All the factors that militate against amendment, except bad faith, are present in this record. The motion for leave to file a second amended complaint is DENIED.

SIGNED on September 10, 2001 at Houston, Texas.

/s/ _____
Lee H. Rosenthal
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-00-1620

[Filed July 23, 2001]

THOMAS R. HENRICKSON, Plaintiff,	)
vs.	)
JOHN E. POTTER, POSTMASTER GENERAL OF THE U.S. POSTAL SERVICE, Defendant.	)

MEMORANDUM AND RECOMMENDATION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This case was referred by United States District Lee H. Rosenthal, for pretrial management, under 28 U.S.C. § 636(b)(1)(A) and (B). (Docket Entry # 20). Pending before the court is the motion by Plaintiff Thomas R. Henrickson ("Henrickson"; "Plaintiff") for leave to file an amended complaint. (Plaintiff's Motion for Leave to File Amended Original Complaint First Pursuant to FRCP 15 (A),

["Plaintiffs Motion to Amend"], Docket Entry #12). Also pending is a motion that was filed by Defendant William Henderson, Postmaster General of the United States Postal Service, ("Henderson"; "Defendant"; "the Postal Service") for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. (Defendant's Motion for Summary Judgment, Docket Entry #23; Memorandum in Support of Defendant's Motion for Summary Judgment ["Defendant's Memorandum of Law"], Docket Entry #24). Plaintiff has responded in opposition to Defendant's motion. (Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, ["Plaintiff's Response"], Docket Entry #25). After reviewing the pleadings, the relevant evidence and the applicable law, Plaintiff's motion to amend is GRANTED. And for the reasons that follow, it is RECOMMENDED that Defendant' s motion for summary judgment be GRANTED in part, and DENIED in part.

Plaintiff's Motion to Amend

On September 29, 2000, Plaintiff filed a motion for leave to file his first amended complaint. (Docket Entry #12). Pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, after an answer has been filed, leave of court is required to file an amended pleading, and "leave to amend shall be freely given when justice so requires." FED. R. CIV. P. 15. "In the absence of... undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.-- the leave sought should, as the rules require, be freely given." *Engstrom v. First NationalBank of Eagle Lake,* 47 F.3d 1459, 1464 (5th Cir. 1995) (quoting *Foman v. Davis,* 371 U.S. 178 (1962)) (internal quotations

omitted, alterations in original). Here, Henrickson filed his amended complaint on September 29, 2000. (Original Complaint-First Amended, ["Plaintiff's First Amended Complaint," Docket Entry # 13). In the amended complaint, Plaintiff added an allegation that his disability claims also arise under 29 U.S.C. § 701, *et seq.*, the Rehabilitation Act; 42 U.S.C. §2000e *et. seq.;* the Civil Rights Act o f 1964; and 42 U.S.C. § 1981, the Civil Rights Act of 1866 and 1871, and he alleged that Defendant retaliated against him for filing a complaint with a counselor for the Equal Employment Opportunity Commission. (*Id.*) To date, Defendant has not objected to these amendments, and under Rule 7.4 of the Local Rules of the United States District Courts for the Southern District of Texas, the motion is considered unopposed. (LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, LR 7.4 (2000)). Further, Defendant has addressed the amended complaint in its motion for summary judgment, and so no delay will result if the request is granted. As there is no opposition, or complaint of prejudice or delay, Henrickson's motion to amend his complaint is GRANTED.

Background

Plaintiff was hired, as a mailhandler, by the United States Postal Service on May 25, 1985. (Plaintiff' s First Amended Complaint, ¶ 5.6.1). In January 1998, Plaintiff took a medical leave from his job to undergo surgery for carpel tunnel syndrome, a "left ulna nerve entrapment," and a "right rotator cuff tear." (*Id.*, ¶ 5.6.2). The next month, following the surgery, Henrickson gave his supervisor a recommendation, written by his doctor, that he use an

ergonomic chair on his return to work. (Plaintiff's Response, "Affidavit of Thomas R. Henrickson," ¶13). With that recommendation, Plaintiff also provided some information from the "Relax the Back" store, which detailed the cost of a specific chair that purportedly met the doctor's recommendation. (*Id.*) Plaintiff also submitted a written request to the "Office of Worker's Compensation Program" to purchase the desired chair. (Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, Exhibit E, "Response to Notice Regarding Findings of Fact and Conclusions of Law Without a Hearing at 3). On March 2, 1998, Plaintiff was released by his doctor, Michael Brown, M.D., to return to work under the following restrictions:

> No lifting/carrying up to 10 lbs, intermittently 2 hours a day; no pushing/pulling intermittently 6 hours a day; no reaching above shoulder; may only work at waist level or below, no tossing or casing of mail; no overhead work; may only work 8 hours a day and to avoid cold areas.

(Id., ¶ 5.6.3). On March 13, 1998, when Henrickson returned to his postal duties, Defendant offered him a "limited duty job," to accommodate his restrictions. (Plaintiff's First Amended Complaint, ¶ 5.6.4; Defendant's Memorandum of Law at 3). "Limited duty" work entails "patching damaged" mail. *(Id.)* Henrickson worked in this limited capacity from March 13, 1998, until May 20, 1998. *(Id.)*

On May 20, 1998, Plaintiff again gave his supervisor a copy of his doctor's recommendation that he use "a prescribed custom ergonomic chair with armrests."

(Plaintiff's First Amended Complaint, ¶ 5.6.5; Exhibit A, "Letter from Dr. Michael G. Brown, M.D. dated March 31, 2000). Two days later, Plaintiff spoke with Yvonne Edwards ("Edwards"), supervisor of "Distribution Operations," and told her that he was not able to work without the specific ergonomic chair from the "Relax the Back" store. (Plaintiff's Response in Opposition to Defendant's Motion to Dismiss, Exhibit E, "Response to Notice Regarding Findings of Fact and Conclusions of Law Without a Hearing at 3). Edwards contacted Linda Schultz ("Schultz"), manager of "Distribution Operations," to arrange a meeting to discuss Plaintiff's request. (Plaintiff's First Amended Complaint, ¶ 5.6.5). After reviewing the information submitted, Schultz reportedly told Henrickson that there was no evidence to substantiate the claim that he needed a specific chair. (Plaintiff' s Response in Opposition to Defendant's Motion to Dismiss, Exhibit E, "Response to Notice Regarding Findings of Fact and Conclusions of Law Without a Hearing at 3, Docket Entry #11). Schultz did, however, offer Henrickson a choice among several alternative chairs that were already available. *(Id.;* Defendant's Memorandum of Law at 4; Plaintiff's Response at 3). Plaintiff refused this offer. *(Id.)* During that meeting, which took place on May 22, 1998, Henrickson asked Schultz to sign a "PS Form 3971."[1] *Id.*

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[1] An employee who suffers an on-the-job injury has the right to elect a salary continuation for a maximum of forty-five days. (Plaintiff's Response in Opposition to Defendant' s Motion to Dismiss, Exhibit E, "Response to Notice Regarding Findings of Fact and Conclusions of Law Without a Hearing," n. 1, Docket Entry #11). To do so, the employer must sign an authorization form which has been designated "PS Form 3971."(*Id.*)

This request was also denied. (*Id.*) Plaintiff never returned to work following his meeting with Schultz. (Plaintiff's Response at 6; Response to Notice Regarding Findings of Fact and Conclusions of Law Without a Hearing at 3). Three days later, on May 23, 1998, he was declared "absent without leave." *(Id.)* Henrickson remained "absent without leave" until June 8, 1998. *(Id.)* On that date Plaintiff's status was apparently changed because he submitted a doctor's recommendation that he not return to work to "prevent further re-injury." (Plaintiff's First Amended Complaint, Exhibit A, "Letter from Michael G. Brown, M.D. Dated March 31, 2000 "). Henrickson allegedly relied on this recommendation, and so he did not report for work at that time. (Response to Notice Regarding Findings of Fact and Conclusions of Law Without a Hearing at 3).

Several months later, in September 1998, Henrickson was again released to return to work. (Response to Notice Regarding Findings of Fact and Conclusions of Law Without a Hearing at 3). Before he did so, however, he submitted supplemental medical reports on his physical condition. *(Id.)* He gave this information to his employer on September 9, 1998, and again on September 28, 1998. *(Id.)* These additional reports allegedly documented Henrickson's need for a "prescribed ergonomic chair only" so that he could work safely. *(Id.)* Plaintiff claims that, even after receiving these documents, Defendant refused to acknowledge his medical need or to accommodate his disability, and so he refused to return to work. (Defendant's Memorandum of Law, Exhibit, "EEO Investigative Affidavit"). Again, he was listed as "absent without leave," beginning in September 1998. (Response to Notice Regarding Findings of Fact and

Conclusions of Law Without a Hearing at 4; Defendant's Memorandum of Law, Exhibit, "Memorandum of Thomas Henrickson Dated January 20, 1999").

Approximately two months later, on December 27, 1998, Schultz informed Henrickson, by written notice, that his submission to the Office of Worker' s Compensation Program ("OWCP") was refused, and that the Postal Service would not purchase the chair he selected from the "Relax the Back" store. (Defendant's Memorandum of Law, "EEO Investigative Affidavit"). She again offered Plaintiff the use of any chair available, but he declined, reportedly because the offered chairs were not the same as the one that his doctor recommended. *(Id.)* Approximately one month later, on January 21, 1999, Henrickson's supervisors asked him to provide additional medical evidence of his disability. (Plaintiff's First Amended Complaint, ¶ 5.6.9). He alleges that, although he complied with this request within five days, the Postal Service still did not provide the specific chair that he requested as an accommodation. *(Id.,* ¶5.6.10; Defendant's Memorandum of Law at 5).

On March 2, 1999, Henrickson contacted an Equal Employment Opportunity counselor ("EEO counselor") to lodge a complaint. (Defendant's Memorandum of Law, Exhibit, "Information for Precomplaint Counseling"). He reported that he was discriminated against because of his physical disability and that the Postal Service refused to accommodate this condition. (Defendant's Memorandum of Law, Exhibit, "Information for Precomplaint Counseling"; Plaintiff's First Amended Complaint, ¶ 5). On June 17, 1999,

the EEO counselor designated the following issues for investigation:

> 1) On May 22, 1998, management officials refused to sign your PS Form 3971 requesting continuation of pay ("COP");
> 2) on September 9 and 28, 1998, you submitted medical updates revealing that you needed a high back chair to accommodate your disability and was later charged AWOL; and
> 3) on January 21, 1999, you received a letter requesting proof of your condition and returned the update on January 25, 1999, however you were not accommodated.

(Defendant's Memorandum of Law, Exhibit "Letter from the United States Postal Service Dated June 17, 1999," p.2). On July 6, 1999, the EEO counselor amended the issues designated to include an allegation that "[o]n December 27, 1998, you were not given an accommodation." (Defendant's Memorandum of Law, Exhibit "Letter from United States Postal Service Dated July 14, 1999"). When the EEO investigation was complete, Plaintiff requested a hearing with an administrative law judge. (Defendant's Memorandum of Law at 6; Exhibit, "Decision by EEOC Judge Read Issued February 11, 2000"). On January 5, 2000, the Administrative Law Judge, Mona Read, sent notice to both parties that she would issue a decision without a hearing. *(Id.)* On February 7, 2000, Judge Read recommended that the Postal Service find that no discrimination had occurred. (Defendant's Memorandum of Law, Exhibit, "EEOC Decision Dated February 7, 2000"). On February 28, 2000, the Postal

Service issued a notice of final action which denied Plaintiff's claims. (Plaintiff's First Amended Complaint, ¶ 2.9; Defendant's Memorandum of Law at 6).

Henrickson then filed this lawsuit, on May 12, 2000, alleging that Defendant failed to accommodate his disability in violation of common law and the following statutes: 42 U.S.C. §12101 *et seq.*, the Americans with Disabilities Act ["ADA"]; 29 U.S.C. §701, *et seq.*, the Rehabilitation Act; 42 U.S.C.§2000e *et seq.*, the Civil Rights Act of 1964; and 42 U.S.C. § 1981, the Civil Rights Act of 1866 and 1871. (Plaintiff's First Amended Complaint, ¶¶ 1.2-1.5; ¶¶ 5.7.1-5.7.5). Plaintiff also claims that Defendant violated these statutory provisions by denying his request for a "continuation of pay"; by designating him "absent without leave"; and by retaliating against him after he filed a charge with the Equal Employment Opportunity Commission ["EEOC"].[2] (*Id.*, ¶¶ 5.6.18, 5.6.20)

Defendant has moved for summary judgment, arguing that all of Plaintiff's claims under the Americans with Disabilities Act, ["ADA"], § 1981 and, under the common law, should be dismissed. Defendant points out that 42 U.S.C. § 2000e-16, ["Title VII"] provides the exclusive remedy for claims of

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[2] Henrickson alleged previously that Defendant retaliated against him because he filed this suit. (Plaintiff's Response at 7). Plaintiff points out that the Postal Service deemed him "absent without leave" for two years, but did not fire him until July 19, 2000, after the suit was filed. *(Id.)* However, Plaintiff abandoned this claim in his most recent pleading, and so it is not addressed in this memorandum.

discrimination against the federal government, by its employees; therefore, his claims under the ADA and § 1981 are without merit (Defendant's Memorandum of Law at 9-10). Defendant also contends that Plaintiff's remaining claims, under the Rehabilitation Act, should be dismissed because he did not file an administrative complaint with an EEO counselor in a timely fashion, as required by the regulations promulgated under § 42 U.S.C. § 2000e-16. *(Id.* at 14). Defendant argues as well that Plaintiff's claim under the Rehabilitation Act fails because he cannot show that he is disabled within the meaning of the Act, and because the Postal Service has repeatedly offered him reasonable accommodations for his alleged disability. *(Id.* at 18, 20). Defendant insists that any retaliation action must fail because Plaintiff cannot show a causal connection between his protected activity and the allegedly discriminatory actions. *(Id.* at 22). Finally, Defendant argues that Plaintiff's request for punitive damages should be dismissed as such awards are not available in actions against the government. *(Id.* at 10).

After a review of the pleadings, the evidence, and the relevant law, the court RECOMMENDS that Defendant's motion for summary judgment be GRANTED as to Plaintiff's claim of retaliation, his request for punitive damages, and his claims under both the ADA and § 1981, but DENIED as to Plaintiffs claims under the Rehabilitation Act.

Standard of Review

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED R. CIV. P. 56(c). Under

Rule 56(c), the moving party bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue for trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *Norman v. Apache Corp.,* 19 F.3d 1017, 1023 (5th Cir. 1994). The party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, but need not negate the elements of the non-movant's case. *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir.1994). If the moving party fails to meet its initial burden, the motion for summary judgment must be denied, regardless of the non-movant's response. *Id.* When the moving party has met its Rule 56 burden, the non-movant cannot survive a motion for summary judgment by resting merely on the allegations in its pleadings. *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995). If the movant does meet his burden, the non-movant must go beyond the pleadings and designate specific facts to show that there is a genuine issue for trial. *Little,* 37 F.3d at 1075. Further, the non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Webb v. Cardiothoracic Surgery Assocs.,* 139 F.3d 532, 536 (5th Cir. 1998) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986)).

To meet its burden, the nonmoving party must present "significant probative" evidence indicating that there are issues of fact remaining for trial. *Conkling v. Turner,* 18 F.3d 1285, 1295 (5th Cir. 1994). If the evidence presented to rebut the summary judgment motion is only colorable or not significantly probative, summary judgment should be granted.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250. (1986). But, in deciding a summary judgment motion, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [his] favor." *Id.* at 248. However, "Rule 56 mandates the entry of summary judgment, after adequate time for discovery, and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Little,* 37 F.3d at 1075.

Discussion

Claims under the Americans with Disabilities Act

Henrickson claims that the Postal Service discriminated against him when it refused to accommodate his physical disability; refused to sign his "continuation of pay" form; wrongfully designated him as "absent without leave"; and then retaliated against him for filing a complaint with an EEO counselor. (Plaintiff s First Amended Complaint, ¶¶ 2.1-2.7 and ¶¶ 5.7.1-5.7.2). All of these actions are said to violate 42 U.S.C. §12101 *et seq.*, the Americans with Disabilities Act, and 42 U.S.C. §701 *et. seq.*, the Rehabilitation Act. *(Id.)* The Postal Service, however, insists that Plaintiff cannot pursue his disability claims under the ADA because the Rehabilitation Act and Title VII are the only avenues of relief available to federal employees claiming discrimination, based on disabilities. (Defendant' s Memorandum of Law at 9-10).

It is true that the ADA provides a private cause of action against employers who discriminate against employees

because of a physical or other disability. The ADA states, specifically, that,

> [n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. §12112(a). The term "covered entity" applies to employers, employment agencies, labor organizations, or joint-labor management committees. 42 U.S.C. §12111(2). It is well-settled, however, that the ADA does not permit discrimination actions against the federal government because the statute expressly exempts federal employers from those provisions of the Act. 42 U.S.C. §12111(5)(B). The ADA states, explicitly, that, "[t]he term 'employer' does not include-- (i) the United States or a corporation wholly owned by the government of the United States." 42 U.S.C. §12111 (B)(i). Defendant contends that the claim is subject to dismissal because it is an exempt employer under the statute.

Clearly, a funding that the Postal Service maybe exempt from liability, under the ADA, turns on whether it can be properly characterized as the "United States," or a "corporation wholly owned by the government of the United States." 42 U.S.C. §12111 (5)(B). Although, to date, the Fifth Circuit has not addressed the character of the Postal Service with respect to the ADA, it has reviewed its status in a similar context. In *Prewitt v. United States Postal Service,*

662 F.2d 292 (5th Cir. 1981), the Fifth Circuit assessed whether summary judgment was proper on a plaintiff's Rehabilitation Act claim against the Postal Service. *Prewitt v. United States Postal Service*, 662 F.2d 292 (5th Cir. 1981). The Fifth Circuit noted that it was the first time that it had "been called upon to determine the nature and extent" of a plaintiffs private right of action under the Rehabilitation Act. *Id.* at 301. Before addressing the merits of the plaintiffs claim, the court examined the language and the legislative history of the Rehabilitation Act in some detail. *Id.* The court pointed out that the government's duties under the Rehabilitation Act were set out in Section 501(b), 29 U.S.C. §791(b). *Id.* at 301. That section states as follows:

> Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall ... submit to the Civil Service Commission and to the (Interagency Committed on Handicapped Employees) an affirmative action plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality.

Id. The court also observed that, in 1978, the Rehabilitation Act was amended to provide a private cause of action for persons subject to "handicap discrimination by the federal government employing agencies." *Id.* at 302. The Fifth Circuit's discussion of the Rehabilitation Act in *Prewitt* sheds some light on the issue before this court. The *Prewitt* finding that the Postal Service is considered a "department, agency, and instrumentality" of the United States for the purposes of

the Rehabilitation is instructive on whether it should be viewed similarly under the ADA.

Although no other federal appellate court has decided, expressly, whether the Postal Service is exempt from suit under the ADA, several district courts have addressed this question. The majority of these courts has found that the Postal Service is an exempt federal employer under that Act. For instance, in *Batiste v. Henderson,* 2000 WL 264001 (E.D. La. 2000), the plaintiff claimed that he was discriminated against by the Postal Service, due to his disability, and he sued under both the ADA and the Rehabilitation Act. *Batiste v. Henderson,* 2000 WL 264001, 1 n. 1 (E.D. La. 2000). The Postal Service moved to dismiss the ADA claim arguing that no cause of action is permitted against the federal government under that statute. *Id.* In that case, the district court analyzed the express language of the ADA to determine which entities are subject to liability. *Batiste,* 2000 WL 264001, 1 n. 1. In particular, the court cited that provision which states, "[t]he term "employer does not include -- (i) the United States, or a corporation wholly owned by the government of the United States...." 42 U.S.C. § 12111(5)(B). From this language alone, the district court concluded that the Postal Service was exempt and dismissed the claim. *(Id.)* Similarly, in *Brown v. Henderson,* 2000 WL 362035 (S.D. Ala. 2000), the district court observed that"[i]t is clearly settled law that the ADA excludes the United States from its definition of a 'covered entity.'" *Id.* It held that, "[b]ecause the USPS [United States Postal Service] is a branch of the United States, the ADA does not govern its conduct." *Id.* IN reaching that decision, the district court relied on an opinion from the United States Court of Appeals

for the Third Circuit, *Mengine v. Runyon,* 114 F.3d 415 (3rd Cir. 1997). In *Mengine,* the circuit court reviewed a postal employee's disability claim, under the Rehabilitation Act, and in evaluating that allegation, it remarked that the Rehabilitation Act "is only applicable to federal employers, such as the Postal Service...." *Mengine v. Runyon,* 114 F.3d 415, 418 n. 2 (3rd Cir. 1997); *Brown,* 2000 WL 362035,1. Finally, in *Peterson v. Henderson,* 1998 WL 1119860 (E.D. Mich. 1998), the district court dismissed a plaintiff's ADA, claim against the Postal Service, relying solely on that language of the Act which identifies those employers subject to its reach. *Peterson v. Henderson,* 1998 WL 1119860, 3 (E.D. Mich. 1998). In doing so, the trial court referred to 39 U.S.C. §201, in which the Postal Service is defined as "an independent establishment of the executive branch of the Government of the United States." *Id.* (citing 39 U.S.C. §201). On the authority of those two provisions, the court held that the Postal Service is not subject to liability under ADA.[3] (*Id.*)

Those previous district court findings on the applicability of the ADA exemption are persuasive in this instance. Moreover, such a conclusion is strengthened by the Fifth Circuit's discussion in *Prewitt.* Indeed, a plain reading of §12111(b)(5) of the ADA, and 39 U.S.C. §201, leads to the conclusion that the Postal Service should be deemed a federal employer under the ADA. Accordingly, the court

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[3] *See also D'Antonio v. Runyon,* 1994 WL 622107, 5 (E.D. Pa. 1994); *Brantley v. Runyon,* 1997 WL 373739, 4 (S.D. Ohio 1997); and *Riley v. United States Postal Service,* 1996 WL 743832 (N.D.N.Y 1996).

RECOMMENDS that Defendant's motion for summary judgment be GRANTED on Henrickson's claims under the ADA, and that those claims be DISMISSED, with prejudice.

Claims under Section 1981

Plaintiff also alleges that Defendant' s actions violated 42 U.S.C. § 1981, the Civil Rights Act of 1866 and 1871. (Plaintiff's First Amended Complaint, ¶¶ 2.1-2.7 and ¶¶ 5.7.1-5.7.2). Again, Defendant points out that Henrickson may not pursue a claim under § 1981 because Title VII is the exclusive remedy available for claims of discrimination by government employees. (Defendant's Memorandum of Law at 9-10). More importantly, however, Henrickson's §1981 claim must fail because that statute provides a cause of action only for allegations that are based on racial discrimination. Indeed, § 1981 states, in relevant part, that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (a). That statute gives "refuge under federal law from race-based employment discrimination...." *Fadeyi v. Planned Parenthood Assoc. of Lubbock, Inc.* 160 F.3d 1048, 1049 (5th Cir. 1998); *see Harrington v. Harris,* 118 F.3d 359, 366 (5th Cir. 1997); *see LaPierre v. Benson*

Nissan, Inc., 86 F.3d 444, 448 n. 2 (5th Cir. 1996); *Todd v. Hawk,* 72 F.3d 443,445 n.6 (5th Cir. 1995); *see Green v. State Bar of Texas,* 27 F.3d 1083, 1086 (5th Cir. 1994). In this instance, Henrickson has not alleged any acts that detail discrimination that purportedly stemmed from his race or nationality. In his amended pleading, Henrickson complains only that Defendant discriminated against him because of his physical impairment. Henrickson argues that, on four occasions in 1998, and once in 1999, the Postal Service refused his requests to purchase a particular ergonomic chair that he claimed was necessary to his employment. (See Plaintiff's First Amended Complaint, ¶¶5.6.5-5.6.17). He also complains that his supervisor's refusal to sign a "continuation of pay" form, and his designation as "absent without leave status" were unlawful. (*Id.* at ¶ 5.6.18). Nowhere, however, does Henrickson allege that race or national origin motivated Defendant's refusal to accommodate his disability. Clearly, the sole basis for Henrickson's claims is his alleged disability. (*Id.*)

Even had Henrickson claimed that he was subject to racial discrimination, under § 1981, it is well-settled that employment discrimination suits are not permitted against the United States Postal Service, under 42 U.S.C. § 1981. *Newbold v. United States Postal Services,* 614 F.2d 46 (5th Cir. 1988) (citing *Brown v. General Services Administration*, 425 U.S. 820, 829 (1976)). "[Title VII] is an exclusive preemptive administrative and judicial scheme for the redress of federal employment discrimination." *Newbold,* 614 F.2d at 46 (citing *Brown,* 425 U.S. at 829); *see McLaughlin v. Hoffman,* 547 F.2d 918, 921 n.5 (5th Cir. 1977); *see Eastland v. Tennessee Valley Authority,* 553 F.2d 364, 371

(5th Cir. 1977). For that reason, Henrickson's §1981 claim against the United States Postal Service is without merit. It is RECOMMENDED that all claims under §1981 should be DISMISSED, with prejudice.

Retaliation

Plaintiff claims that the Postal Service retaliated against him "by failing to accommodate [him] after [he] filed art EEOC charge." (Plaintiff's First Amended Complaint, ¶ 5.6.20). The Postal Service argues, in response, that Henrickson's retaliation claim fails, as a matter of law, because he cannot establish a prima facie case. (Defendant's Memorandum of Law at 22). Defendant contends, specifically, that "there is no credible evidence to suggest a causal connection between [P]laintiff's protected activity and the challenged actions." (*Id*). To establish a prima facie case of retaliation, under Title VII, a plaintiff must show "1) that he engaged in activity protected by Title VII; 2) that he suffered an adverse employment action; and 3) that a causal connection exists between the protected activity and the adverse employment action." *Byers v. The Dallas Morning News, Inc.*, 209 F.3d 419, 427 (5th Cir. 2000); *Sherrod v. American Airlines*, 132 F.3d 1112, 1122 N.8 (5th Cir. 1998); *Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir. 1995). An employee has engaged in protected activity if he or she has "1) opposed any practice made an unlawful employment practice by [made unlawful by Title VIII," or "2) made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." *Byers*, 209 F.3d at 427 (citing 42 U.S.C. § 2000e-3(a)).

There is no dispute that Henrickson engaged in a protected activity when he filed his initial complaint with an EEO counselor, on March 2, 1999. (Defendant's Memorandum of Law, Exhibit, "Information for Precomplaint Counseling"; Plaintiff's First Amended Complaint, ¶ 5). However, Plaintiff cannot establish that he was subjected to any adverse employment action aider this filing took place. "Adverse employment actions include discharges, demotions, refusals to hire, refusals to promote, and reprimands." *Southard v. Texas Board Of Criminal Justice,* 114 F.3d 539, 555 (5th Cir. 1997). On this point, Plaintiff has not submitted any evidence that raises a genuine issue of material fact on whether he was discharged, demoted, or officially reprimanded by his supervisors at the Postal Service, aider his contact with an EEO counselor. In fact, Plaintiff relies only on his contention that it was an act of retaliation for the Postal Service to refuse to buy the requested ergonomic chair after he complained to the EEO counselor. (Plaintiff's Response at 6; Plaintiff's First Amended Complaint, ¶ 5.6.20). It is undisputed, however, that the Postal Service refused to buy this particular chair before Henrickson ever lodged his complaint on March 2, 1999. (Response to Notice Regarding Findings of Fact and Conclusions of Law Without a Hearing at 3; Plaintiff's First Amended Complaint, ¶¶5.6.5-5.6.10). In fact, the sole grounds of Henrickson's filing with the EEO counselor was the alleged refusal to accommodate his disability on May 22, 1998; on September 9, 1998; on September 28, 1998; on December 27, 1998; and on January 25, 1999. (Letter from the United States Postal Service Dated June 17,1999; Letter from the United States Postal Service Dated July 14, 1999). It follows that Henrickson cannot show that the Defendant's refusal to "accommodate him" was the result of a protected

activity. Plaintiff has not established a causal link between his filing with the EEO counselor and any alleged adverse employment action that was taken by Defendant after that filing. The court finds, therefore, that the retaliation claim fails. It is RECOMMENDED that Defendant's motion for summary judgment should be GRANTED on this issue and that Henrickson's retaliation claim be DISMISSED with prejudice.

Plaintiffs Claims under the Rehabilitation Act

Defendant argues that Henrickson's claims under the Rehabilitation Act should be dismissed because he did not file them within the time specified in the applicable EEOC regulations. (Defendant's Memorandum of Law at 10-17). Defendant points out that claimants under the Rehabilitation Act must first file a complaint with an EEO counselor, before a suit can be entertained, and that the filing is a jurisdictional prerequisite to proceeding in federal court. (*Id.* at 15). Defendant contends that Plaintiff knew of the allegedly discriminatory conduct in May, September, and December of 1998. (*Id.*) However, he did not speak to an EEO counselor until March 2, 1999, well past the forty-five day period of limitations set out in the regulations. (*Id.*) Defendant argues that Henrickson did not file his complaint, on the claims which accrued in 1998, in a timely manner. *(Id.)* Defendant maintains, therefore, that Plaintiff is barred from pursuing them absent some proof that a tolling of the limitations period is appropriate. (*Id.*) Defendant argues further that Plaintiff has not shown, or even alleged, any facts to support an equitable, or other, tolling of the deadline to file his complaint. For that

reason, the Postal Service urges the court to dismiss each of these claims. (*Id.*)

It has long been established that the Rehabilitation Act incorporates the remedies, procedures, and rights set out in Title VII. *See* 29 U.S.C. §794a(a)(1); *Ynclan v. Department of the Air Force,* 943 F.2d 1388, 1390 (5th Cir. 1991); *Prewitt,* 662 F.2d at 303; *Boyd v. United States Postal Service,* 752 F.2d 410,412 (9th Cir. 1985); *McGuinness v. United States Postal Service,* 744 F.2d 1318, 1320 (7th Cir. 1984). It is further well-settled that Title VII requires a claimant to first exhaust all available administrative remedies before he may bring an employment discrimination suit in federal court. Hampton v. Internal Revenue Service, 913 F.2d 180, 181. (5th Cir. 1990)(citing *Porter v. Adams*, 639 F.2d273 (5th Cir. 1981)). Federal employees must also comply with the relevant EEOC regulations, which state as follows:

> Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

29 C.F.R. § 1614.105 (a). The regulations specify that a claimant "[m]ust initiate contact with a counselor ["EEO counselor"] within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action." 29 C.F.R. §1614.105 (a)(1). The EEO counselor must then advise the claimant, in writing, of his obligations including the

"administrative and court time frames." 29 C.F.R. § 1614.105 (b). If, after a mandatory thirty day counseling period, the matter cannot be resolved informally, the EEO officer must inform the claimant of his right to file a discrimination complaint with the agency. 29 C.F.R. § 1614.105(d). The complainant must file that claim within fifteen days of the receipt of such notice. 29 C.F.R. §1614.106 (b). After this filing, the agency conducts a "complete and fair investigation of the complaint." 29 C.F.R. § 1614.106(d)(2). If the agency dismisses the complaint, the claimant may appeal to the EEOC, or file a civil action in federal district court. 29 C.F.R. §1614.110. However, a plaintiff' s "failure to notify an EEO counselor in a timely fashion may bar a claim, absent a defense of waiver, estoppel, or equitable tolling." *Pacheco v. Rice*, 966 F.2d 904, 905 (5th Cir. 1992); *Henderson v. United States Veterans Admin.*, 790 F.2d 436, 439-440 (5th Cir. 1986).

Here, Henrickson asked the Postal Service to accommodate his disability on May 22, 1998; on September 9, 1998; on September 28, 1998; and again on December 27, 1998. (Defendant's Memorandum of Law, Exhibit "Information for Precomplaint Counseling"; Plaintiffs First Amended Complaint). Henrickson contends that despite these requests, the Postal Service refused his request. *(Id.)* Following those refusals, the Postal Service sent Henrickson a letter, on January 21, 1999, demanding additional proof of the alleged disability. *(Id.)* Plaintiff insists that, even after he complied promptly with this request, the Postal Service still refused to purchase the desired chair. *(Id.)* In his "pre-complaint application," Plaintiff made reference to each of these refusals, and on the application, he listed the dates on

which the "act[s] of discrimination took place." (Defendant's Memorandum of Law, Exhibit "Information for Precomplaint Counseling" and Exhibit "EEO Complaint of Discrimination in the Postal Service"). Despite the fact that Plaintiff knew of the allegedly discriminatory practices as early as the Spring of 1998, he did not ask for a meeting with an EEO counselor until March 2,1999. (Defendant's Memorandum of Law, Exhibit "Information for Precomplaint Counseling"). Most of the alleged discriminatory conduct, about which Plaintiff complains, took place as early as May 1998 and as late as December 1998, well beyond the forty-five day limit set out in the regulations. In fact, sixty-five days elapsed between Henrickson's complaint and the December 27, 1998 refusal to purchase the requested chair. It is well-settled in this circuit that because "[t]imely filing [with an EEO counselor] is a prerequisite to ... a Title VII action ... the failure to file within the statutory period will ordinarily operate as a bar to suit [in federal court]." *Abrams v. Baylor College of Medicine,* 805 F.2d 528, 532 (5th Cir. 1986)(citations omitted).

In response, Plaintiff argues that he does not have to show that the violations took place within the forty-five day period because Defendant's acts constituted a "continuing violation." (Plaintiff's Response at 10). Plaintiff claims that "[D]efendant consistently and continually failed to accommodate [his] requests for [an] accommodation each and every day through the time Defendant wrongfully terminated [him] on (July 19, 2000)." (*Id.* at 10). True, it has been held that "where the last act alleged is part of an ongoing pattern of discrimination and occurs within the filing period, allegations concerning earlier acts are not time-barred." *McGregor v. Louisiana State*

University Board of Supervisors, 3 F.3d 850, 866 (5th Cir. 1993); *Webb v. Cardiothoracic Surgery Associates of North America,* 139 F.3d 532, 537 (5th Cir. 1998) (citing *Messer v. Meno,* 130 F.3d 130, 134-135 (5th Cir. 1997)); *Abrams,* 805 F.2d at 532). However, this equitable exception arises only, "[w]here the unlawful employment practice manifests itself over time, rather than as a series of discrete acts." *Webb,* 139 F.3d at 537 (citing *Waltman v. International Paper Co.,* 875 F.2d 468, 474 (5th Cir. 1989); *Abrams,* 805 F.2d at 532). A court's inquiry into whether a series of incidents constitutes a "continuing violation" turns on the facts of each case. *Berry v. Board of Supervisors of L.S.U.,* 715 F.2d 971, 981 (5th Cir. 1983). The Fifth Circuit has detailed three non-exclusive factors that courts should consider in undertaking that inquiry:

> The first is subject matter. Do the alleged acts involve the same type of discrimination, ending to connect them to a continuing violation? The second is frequency. Are the alleged acts recurring ... or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?

Id. It follows, therefore, that to succeed on an assertion that the offending acts constituted a "continuing violation," a plaintiff must show that the incidents complained of were part

of a day-to-day application of an illegal policy. *Huckaby v. Moore*, 142 F.3d 233, 239 (5th Cir. 1998). In fact, the Fifth Circuit has observed that if a plaintiff is seeking the benefits of the continuing violation doctrine, for claims under the Rehabilitation Act, he must first "'[a]llege a continuing policy which is a clear violation of Title VII or the Rehabilitation Act.'" *McGregor,* 3 F.3d at 866 n.27 (citing *Curry v. United States Postal Service,* 583 F.Supp 334 (S.D. Ohio 1984)). A plaintiff must show "an organized scheme leading to and including a present violation, such that it is the cumulative effect of the discriminatory practice, rather than any discrete occurrence that gives rise to the cause of action." *Huckaby,* 142 F.3d at239 *(citing Messer,* 130 F.3d at 135; *Glass v. Petro-Tex Chemical Corp.,* 757 F.2d 1554, 1561 (5th Cir. 1985)).

Here, Henrickson claims that on five different occasions, between May 1998 and January 1999, the Postal Service refused to buy the specific chair that he requested as an accommodation to his disability. (Plaintiff's First Amended Complaint). Plaintiff alleges further that his supervisor discriminated against him because she refused to sign a "continuation with pay" form on May 22, 1998. *(Id.)* Finally, Plaintiff contends that, in May 1998, and again, in September 1998, he was discriminated against because he was placed on "absent without leave" status. *(Id.)* Plaintiff argues that the latest act of discrimination, in January 1999, was merely a continuation of the discriminatory conduct that began in the Spring of 1998. (Plaintiff's Response at 10). The Fifth Circuit has held, however, that a plaintiff may not invoke the continuing violation doctrine when the acts alleged are "discrete instance[s] of discriminatory conduct [which] would

put a worker on notice that his rights have been violated." *Huckaby,* 142 F.3d at 239; *Webb,* 139 F.3d at 538. From the undisputed evidence, it is clear that the Postal Service's "refusals to accommodate" Plaintiff were individual responses to each request for a particular chair from the "Relax the Back" store. The evidence is also clear that Henrickson was designated "absent without leave" on two different dates, in direct response to his failure to appear for work on a specified date. Plaintiff has not shown that these incidents were part of "a scheme leading to and including a present violation"; or that they were a "permanent condition of his workplace." *See Huckaby,* 142 F.3d at 239. The court finds, therefore, that these were discrete events and not part of a "continuing violation." Indeed, Henrickson admitted in his "pre-complaint" application, that he was aware of each of these refusals on the day it occurred. A plaintiff who is aware of alleged discriminatory acts has an obligation to file promptly or lose his claim. *Webb,* 139 F.3d at 537 n.4. The Fifth Circuit has held, repeatedly, that,

> [t]he core idea [of the continuing violation theory] is that equitable considerations may very well require that the filing periods not begin to run until facts supportive of a Title VII charge or civil rights action are or should be apparent to a reasonably prudent person similarly situated. The focus is on what event, in fairness and logic, should have alerted the average lay person to act to protect his rights.

Webb, 139 F.3d at 537 (citing *Glass,* 757 F.2d at 1560-1561 (internal citations omitted)).

It is clear from the evidence that Henrickson was aware that his rights were allegedly violated, throughout 1998, and he was in no need of additional facts to appreciate his employer's purportedly unlawful conduct. *See Webb,* 139 F.3d at 538. Henrickson was on notice that he should have acted to protect his rights, and he has not introduced evidence to raise a genuine issue of material fact on a "continuing violation." *See Huckaby,* 142 F.3d at 239 (citations omitted). Accordingly, the only claims that are timely are those which arise from conduct which took place forty-five days before Plaintiffs meeting with the EEO counselor. Any claim which arose from action taken before January 15, 1999, is time barred. The court finds, therefore, that the allegation that Defendant refused to accommodate Henrickson's disability on January 25, 1999, was timely made and he may proceed on that claim.

Moreover, Plaintiff may yet be entitled to pursue relief, in this court, on all of the claims that accrued in 1998. Under § 1614.105(a)(2) of the EEOC regulations, the requisite time limits may be tolled in circumstances other than the context of a continuing violation. 29 C.F.R. § 1614.105(a)(2). For instance, the regulations allow a mandatory extension of the forty-five day time limit if the complainant can demonstrate the following:

> [w]hen the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and should not reasonably have known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances

> beyond his or her control from contacting he counselor within the time limits, or for other reasons considered sufficient by the agency or EEOC.

29 C.F.R. § 1614.105 (a)(2). The Fifth Circuit has addressed this regulation and concluded that, "[o]nce the government agency accepts a complaint and acts on it, the time limit mentioned in the regulation for making a complaint to the EEO office of that agency is not mandatory" and can be waived. *Huntley v. Dept. of Health, Education, and Welfare,* 550 F.2d 290, 295 (5th Cir. 1977). That precept was limited, however, in *Oaxaca v. Roscoe,* 641 F.2d 386 (5th Cir. 1981). In *Oaxaca,* it was held that the mere review of an untimely complaint is not sufficient to trigger an automatic waiver of the limitations period. *Henderson,* 790 F.2d at 441 (citing *Oaxaca v. Roscoe,* 641 F.2d 386, 389-390 (5th Cir. 1981)). The court stated that, "[s]uch a broad rule is unacceptable because agencies may inadvertently overlook the timeliness problems and should not thereafter be bound." *Id.* at 441 (citations omitted). The court held, therefore, that time limits will be deemed waived only if the agency investigates, fully, the timeliness of a complaint and finds justifiable reasons for the delay. *Id.*

The record here shows that, despite the fact that Henrickson's complaint was filed out of time, the EEO counselor accepted it for review. (Defendant's Memorandum of Law, Exhibits, "Letter Dated June 17, 1999," and "Letter Dated July 14, 1999"). It is uncontroverted that, after Henrickson filed his complaint with the EEO counselor, an administrative law judge then considered it on the merits and issued an opinion recommending that the claims be denied.

(Defendant's Memorandum of Law, Exhibit, "Letter Dated February 7, 2000"). The Postal Service made its final decision on February 28, 2000. (Plaintiff's First Amended Complaint, ¶ 2.9). In its motion for summary judgment, Defendant argues only that Henrickson's claim under the Rehabilitation Act is barred because it was not timely filed with an EEO counselor. Defendant does not address the issue of waiver or explain how the review of Plaintiff's complaint came about in the first place. From this record, there is no information that reveals the reason that Plaintiff's untimely claims were processed or even whether the timeliness issue was raised. In the absence of evidence, the court cannot assume that the limitations period was waived by the EEO counselor or the Postal Service. *Henderson,* 790 F.2d at 44. Summary judgment is warranted only when the record, as a whole, shows that no genuine issue of material fact remains for trial. *Federal Deposit Insurance Corp. v. Lee,* 130 F.3d 1139,1140 (5th Cir. 1997). Here, the record is silent on whether a time-bar to Plaintiff's complaint was affirmatively waived by the EEOC or the Defendant. It is RECOMMENDED, therefore, that Defendant's motion be DENIED as to Plaintiff's claims under the Rehabilitation Act at this time.

Punitive Damages

Finally, Plaintiff is seeking "compensatory and punitive damages due to the emotional distress Defendant has intentionally inflicted" on him. (Plaintiff's First Amended Complaint, ¶¶ 2.7, 7.6.9). Defendant has moved for summary judgment on this request, arguing that Title VII is the only avenue of relief available to Henrickson, and that the

remedies under that statute do not permit recovery of punitive damages. (Defendant's Memorandum of Law at 10). Under § 1981a, however, a complainant may seek punitive damages for claims arising under Title VII and the Rehabilitation Act. That recovery is governed by § 1981a(2) which states that,

> [i]n an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 ["Title VII", 42 U.S.C.A. §§2000e-5 or 2000e-16] ... against a respondent who engaged in unlawful intentional discrimination ... under section 791 of Title 29 ["the Rehabilitation Act" ... against an individual, the complainting party may recover compensatory and punitive damages as allowed in *subsection (b) of this section* ....

42 U.S.C. § 1981(a)(2) (emphasis added). But subsection(b) of § 1981a, specifically exempts government agencies, and states that,

> [a] complaining party may recover punitive damages under this section against a respondent *(other than a government, government agency or political subdivision)* if the complaining party demonstrates that the respondent engaged in a discriminatory practice...with malice or reckless indifference.

42 U.S.C. §1981a(b)(1)(emphasis added). Again, the relevant issue is whether the Postal Service is a "government agency," and therefore not subject to punitive damages under §1981a(b)(1). As noted, the Fifth Circuit has not yet decided,

expressly, whether the Postal Service is governed by § 1981 a(b)(1). It has, however, characterized the Postal Service as "an agency of the United States" for the purposes of Title VII in *Newbold v. United States Postal Service*, 614 F.2d 46 (5th Cir. 1988). *See Newbold,* 614 F.2d 46; *Prewitt,* 662 F.2d at 301. In that case, the court discussed whether a Postal Service employee may claim racial discrimination, under 42 U.S.C. §1981, and it held that Title VII is the sole remedy for a postal employee. *See Newbold,* 614 F.2d at 46. As mentioned previously, in *Prewitt*, the Fifth Circuit also acknowledged that the Postal Service is an agency of the United States, and 39 U.S.C. § 201, refers to the Postal Service as "an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. §201; *Prewitt,* 662 F.2d at 301.

Even though the Fifth Circuit has not decided this precise point, on punitive damages, two federal appellate courts have addressed this issue. *See Baker v. Runyon,* 114 F.3d 668, 669 (7th Cir. 1997); *Robinson v. Runyon,* 149 F.3d 507 (6th Cir. 1998). In these cases, both circuit courts found that a plaintiff cannot seek punitive damages against the Postal Service because it is a government agency and therefore exempt under § 1981 (a)(b)(1).[4] These conclusions are bolstered by those

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[4] In the Seventh Circuit case, *Baker v. Runyon,* 114 F.3d 668,669 (7th Cir. 1997), the plaintiff sought punitive damages from the Postal Service for alleged Title VII violations, *Baker v. Runyon*, 114 F3d 668, 669 (7th Cir. 1997). The court held that the Postal Service is a government agency for purposes of 42 U.S.C. § 1981a(b)(1), and the request for punitive damages was denied. *Baker,* 114 F.3d at 672. Similarly, in *Robinson v. Runyon,* 149

Fifth Circuit decisions which have found the Postal Service to be an agency of the United States. Accordingly, this court concludes that, because the Postal Service is a "government agency," it is exempt from a claim for punitive damages under §1981a(b)(1). It is RECOMMENDED that Defendant's motion on that issue should be GRANTED.

Order to File Amended Motions

It is clear that Plaintiff pursued three untimely claims in his EEO filing (those which accrued in May 1998, September 1998, and December 1998). The EEOC and the Postal Service nevertheless reviewed the merits of those allegations. It is unclear, from the evidence submitted, whether Defendant

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F.3d 507 (6th Cir. 1998), the Sixth Circuit concluded that the Postal Service is considered an agency of the United States, and so it is exempt from punitive damages liability under 42 U.S.C.§1981a(b)(1). *Robinson v. Runyon,* 149 F.3d 507, 516 (6th Cir. 1998).

These holdings are echoed in the majority of district courts which have addressed similar claims. *See Miller v. Runyon,* 932 F.Supp. 276, 277 (M.D. Ala. 1996)(finding that the Postal Service was a government agency for the purposes of the Civil Rights Act and therefore could not be sued for punitive damages); *Ausfeldt v. Runyon,* 950 F.Supp. 478, 487-88 (N.D.N.Y. 1997) (finding that the Postal Service cannot be sued for punitive damages under Title VII because it is a part of the federal government); *see Jense v. Runyon,* 990 F.Supp. 1320 (D. Utah 1998); *see Clevelandv. Runyon,* 972 F. Supp. 1326 (D.Nev. 1997); *see Tuers v. Runyon,* 950 F.Supp. 284 (E.D. Cal. 1996); *see Crumpton v. Runyon,* 1998 WL 125547 (E.D. Pa. 1998).

affirmatively waived the timeliness matter or whether a justifiable reason for the delay was identified. To date, that issue has not been explored. Accordingly, the parties are to develop the facts and the law on this specific issue.

Further, Defendant has not addressed the merits of Plaintiff's allegation that arose from its January 25, 1999 actions. As there is no time bar to that claim, it remains for trial, even should the 1998 claims ultimately fail. Defendant therefore is invited to file an amended motion for summary judgment, if appropriate, which addresses the merits of that 1999 claim.

It is ORDERED that the parties are to confer and to submit an agreed briefing schedule **within five days of the date that the district court adopts or rejects these recommendations.**

Conclusion

Based on the foregoing, it is ORDERED that Plaintiff's motion to amend is GRANTED. It is further RECOMMENDED that Henderson's motion for summary judgment be GRANTED on Plaintiff's claims for retaliation, for punitive damages, and all claims under the ADA and §1981. However, it is RECOMMENDED that Plaintiff's claims under the Rehabilitation Act be DENIED and that the parties submit new briefing guided by the findings set out in this opinion.

The Clerk of the court shall enter this memorandum and recommendation and provide a true copy to the respective

parties who will then have ten (10) days from the receipt of it to file written objections thereto, pursuant to 28 U.S.C. § 636(b)(1)(C), General Order 80-5, S.D. Texas. Failure to file written objections within the time period provided shall bar an aggrieved party from attacking the factual findings or legal conclusions on appeal.

The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas 77208; copies of any such objections shall be delivered to the chambers of Judge Lee H. Rosenthal, and to the chambers of the undersigned, Room 7007.

SIGNED at Houston, Texas, this 21st day of July 2001.

/s/ _____
MARY MILLORY
UNITED STATE MAGISTRATE JUDGE